8-19-2013

In Re Certified Question of Law Respondent's Brief Dckt. 40262

IN THE SUPREME COURT OF THE STATE OF IDAHO

IN THE MATTER OF THE CERTIFIED QUESTION OF LAW.

KAREN WHITE, an individual, and ELKHORN, LLC, a Florida limited liability company,

Plaintiffs/Appellants,

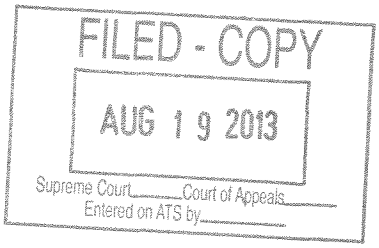
v.

VALLEY COUNTY, a political subdivision of the State of Idaho,

Defendant/Respondent.

Supreme Court Docket No. 40262-2012

U.S. District Court No. 1:09-CV-00494-EJL-CWD



RESPONDENT'S BRIEF

CERTIFIED QUESTION FROM THE U.S. DISTRICT COURT FOR THE DISTRICT OF IDAHO
HONORABLE EDWARD J. LODGE AND HONORABLE CANDY W. DALE, PRESIDING

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

THE CERTIFIED QUESTION

The U.S. District Court certified the following question to this Court:

> Under Idaho law, when does the statute of limitations begin to run on a cause of action arising out of an allegedly illegal impact fee imposed by a local government entity as part of a land use application?

STATEMENT OF THE CASE

This is the brief of Defendant/Respondent Valley County ("County") in response to the opening brief of Plaintiffs/Appellants Karen White and Elkhorn, LLC (collectively "White"). White is the developer of a residential subdivision in Valley County known as White Cloud.

In this litigation, White challenges a condition in her Conditional Use Permit ("CUP") compelling her to enter into a Road Development Agreement ("RDA") calling for payment of $166,496 to mitigate the transportation impacts of Phase I of her development.

This case is the fourth in a series of after-the-fact challenges to fees charged by Valley County and the City of McCall.[1] Others are pending in district court. In each case, developers paid fees without inquiry or objection at a time when the real estate market was going huckledebuck. When the market crashed, they turned from development to litigation. As this Court said recently, "Apparently, Buckskin did not realize that it should not have agreed to make the payments until after the County had made the road improvements described in the agreements and the Valley County real estate bubble had burst." *Buckskin*, 154 Idaho at 493, 300 P.3d at 25. The same may be said of White.

White has already lost most of her claims. All that is left is her damage claim for Phase I under state law.

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[1] The other three cases are *Buckskin Properties, Inc. v. Valley Cnty*, 154 Idaho 486, 300 P.3d 18 (2013) (J. Jones, J.); *Hehr v. City of McCall*, 2013 WL 3466895 (Idaho, July 11, 2013) (Burdick, C.J.); *Alpine Village Co. v. City of McCall*, ___ Idaho ___, 303 P.3d 617 (2013) (Burdick, C.J.).

First, the federal court threw out White's federal taking claims based on her failure to plead 42 U.S.C. § 1983, her tardiness under the two-year statute of limitations, and her non-compliance with *Williamson Cnty Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). *Memorandum Order* at 15-20 (Dkt. 128, CR000951-56).

Second, White's claims regarding Phase II are now moot. During the course of the litigation, the County adopted Resolution 11-6 (Dkt. 96-1, CR001107-10) stating that it would no longer require road development agreements (unless and until it enacted implementing ordinances). Phase II has now been built, and the County issued a final plat for Phase II without any RDA or fee requirement.[2] The project is now complete.

Third, White has abandoned, at least implicitly, her claims for declaratory and/or injunctive relief as to Phase I.[3] White's sole argument as to the four-year statute of limitations is that the statute begins to run on damage claims when the allegedly illegal fee is paid. White offers no argument as to why the four-year statute of limitations has not run on her declaratory and injunctive relief claims. Indeed, she expressly conceded that she "would have had a legal injury at the time the CUP was granted" and could have "sustained a cause of action for whether the conditioning of CUP approval on the payment of an impact fee was legal or illegal." *Appellants' Brief* at 9.

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[2] This was fully documented in briefing and affidavits submitted to the federal court: "There is no longer any basis for injunctive relief. The County approved the final plat for Phase II on December 19, 2011. In accordance with Resolution 11-6, it included no road fee requirement or any requirement for a development agreement. See status reports (Dkt. 131, 132, and 133)." *Valley County's Response Brief in Opposition to Plaintiffs' Motion for Summary Judgment* at 5 (Dkt. 142, CR001052). In *Buckskin*, by the way, this Court reached the same conclusion as to mootness based on the same resolution. *Buckskin*, 154 Idaho at 498-500, 300 P.3d at 28-30. Here, mootness is even clearer, because the County has now approved White's final plat.

[3] White's *Second Amended Complaint* (Dkt. 41, CR000018-24) lists nine items under its prayer. Only one (number 7) is in the nature of damages. The first six are for declaratory and/or injunctive relief, and the last two are boilerplate.

The County is defending the road fees on several grounds, including that White's challenge was tardy and that the payment was voluntary.[4] When the federal court denied the County's motion for summary judgment on those defenses, the County urged the federal court to certify these questions to the Idaho Supreme Court, specifically citing the *Hehr* and *Buckskin* cases, whose decisions at the trial court level were at odds with the federal court's holding and which were then on appeal to this Court. The federal court agreed to certify one of the suggested questions—the one dealing with the statute of limitations—and this Court accepted the certification.

The federal court assumed, incorrectly, that there are two distinct causes of action. Although the certified question is broadly framed, the federal court's commentary in its order focuses on only one cause of action. Meanwhile, the federal court has misapplied Idaho law as to the other cause of action. (See footnote 20 at page 28.) The County's position is that White's case consists of a single cause of action, informally known as inverse condemnation. That cause of

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[4] Although the certified question is limited to the technical defense of timeliness, the County also contends that White's lawsuit fails on the merits. The argument on the merits is still pending before the federal district court. See *Opening Brief in Support of Valley County's Second Motion for Summary Judgment* at 2-6 (CR001009-13). The County's position on the merits is strengthened by this Court's recent ruling in *Buckskin*:

> Furthermore, even without the agreement of the developer, a governing board may attach a condition to a CUP requiring the provision for off-site public facilities or requiring mitigation of effects of the proposed development upon service delivery by any political subdivision. I.C. § 67-6512(d)(6) and (8).

Buckskin, 154 Idaho at 492, 300 P.3d at 24. The holding in *Buckskin* flows from the Court's earlier explanation in *Burns Holdings, LLC v. Teton Cnty Bd. of Comm'rs* ("*Burns Holdings II*"), 152 Idaho 440, 444, 272 P.3d 412, 416 (2012) (Eismann, J.):

> A CUP is used for classifications of uses that the zoning authority has determined will be permitted only if it is allowed to require specified types of conditions that are typically developed on a case-by-case basis in order to mitigate the adverse effects that the development and/or operation of the proposed use may have upon other properties or upon the ability of political subdivisions to provide services for the proposed use. Section 67-6512(d) includes a non-exhaustive list of the types of conditions that can be attached to a CUP.

action encompasses White's allegation that the road fees are illegal taxes and, because they are illegal, constitute a taking and deprivation of due process. All of these state law allegations are bound together and are governed by a single application of the statute of limitations. Even if the Court were to view the case as consisting of distinct causes of action, each of them is subject to the same accrual date—the date on which it became apparent that White's property would be taken. While the federal court correctly recited the words of this Court in describing that standard, it misapplied the standard here. This Court cannot meaningfully respond to the certified question without sorting out the underlying cause(s) of action.

ARGUMENT

I. WHITE PRESENTS A SINGLE CAUSE OF ACTION—INVERSE CONDEMNATION—WITH A SINGLE ACCRUAL DATE.

A. The federal court incorrectly assumed that White presents two, independent causes of action.

The federal court's order certifying this question to this Court includes some commentary on the nature of this litigation and the causes of action involved. (*Certification Order*, Dkt. 151.) That commentary is based on a misunderstanding that is important to correct because it directly relates to the analysis of the certified question and the applicable authorities.

Tracking White's complaint, the federal court describes two separate claims for relief: the first being "Plaintiff's illegal tax claim" and the second being her "inverse condemnation claims." *Certification Order* at 7. In fact, there is only one cause of action available to White—inverse condemnation. That encompasses her request for damages of $166,496 as well as associated declaratory and injunctive relief. All the relief sought is based on the same conduct of the County, the same CUP, and the same alleged violation of law—the "illegal tax" premise. If the CUP and

RDA required payment of an illegal tax, then, *ipso facto*, that is a *per se* taking.[5] That is the only reason it is alleged to be a taking.[6] One cannot separate the two. Accordingly, they are subject to a single accrual date regardless of how White pled them.

The federal court's assumption that there are two causes of action with separate accrual dates reflects a misunderstanding of the nature of the claims. The federal court also misapprehends the County's position and the trial court's ruling in *Hehr v. City of McCall,* Case No. CV-2010-276C (Idaho, June 16, 2011), Dkt. 106-1, CR 000925-36, *aff'd* 2013 WL 3466895 (Idaho, July 11, 2013). The federal court said, "The County did not make any arguments with regard to an accrual date for Plaintiff's illegal tax claim." *Certification Order* at 7. It would be more accurate to say that the County did not make any argument with respect to a separate accrual date for Plaintiff's illegal tax claim. The County has never perceived that there is any difference between the claims, and neither did the district court in its well-reasoned opinion in *Hehr* (Dkt. 106-1, CR 000925-36).

It appears, however, that the federal court did not understand that opinion. The federal court stated:

> The decision in *Hehr*, however, also indicates that the accrual date for the inverse condemnation claim was not the same date on which all of the plaintiff's actionable claims accrued. . . .
> . . . [T]he trial court in Hehr concluded that the accrual date for an inverse condemnation claim is not necessarily the same date

[5] "Since the City had no authority to charge the liquor license transfer fee, its exaction of the fee constituted a taking of property under the United States and Idaho Constitutions." *BHA Investments, Inc. v. City of Boise* ("*BHA II*"), 141 Idaho 168, 172, 108 P.3d 315, 319 (2004) (Eismann, J.).

[6] White also alleges a due process violation. That, too, is based entirely on the illegal tax premise. As this Court said in *KMST, LLC v. County of Ada*, 138 Idaho 577, 581, 67 P.3d 56, 60 (2003) (Eismann, J.), and quoted again in *Buckskin*, 154 Idaho at 495, 300 P.3d at 27, such a due process violation is bound up in the taking claim, all of which is encompassed in the inverse condemnation cause of action: "A property owner who believes that his or her property, or some interest therein, has been invaded or appropriated to the extent of a taking, but without due process of law and the payment of just compensation, may bring an action for inverse condemnation."

> on which all claims challenging the imposition of an allegedly illegal tax accrue.

Certification Order at 13-14.

In fact, the state district court drew no such distinction. It dismissed the entire case, not certain claims, and it applied the four-year statute of limitations and the inverse condemnation accrual analysis to all state-law based claims.

It appears that the federal court misunderstood the state district court's statement that "[i]t was clear that the Plaintiffs had an actionable claim even before the signing of the Development Agreement based on the record before the Court." State court decision at 6, CR000930 (quoted by federal court in the *Certification Order* at 14). That was not a reference to some other actionable claim. The state court was simply observing that the cause of action for inverse condemnation actually accrued even earlier than the date the development agreement was signed. However, since the RDA was more than four years out, there was no need to trace the accrual date back any earlier. This is similar to the district court's holding in the *Buckskin* case. "On January 7, 2011, the district court issued its initial decision, holding that the four-year statute of limitations began to run, at the very latest, on October 25, 2004 . . . ." *Buckskin*, 154 Idaho at 489, 300 P.3d at 21 (emphasis supplied).

This Court upheld the district court's decisions in both *Hehr* and *Buckskin*, but found it unnecessary to reach the statute of limitations in either case. Nothing in those opinions, however, hints at the idea that there is a different statute of limitations analysis for "inverse condemnation" versus "illegal tax" claims. In fact, in *Hehr*, this Court described the plaintiff's claims as follows: "Greystone brought inverse condemnation claims against McCall alleging that the conveyance of the nine lots and the improvements made to those lots constituted an illegal taking under both the Idaho Constitution and the United States Constitution." *Hehr*, 2013 WL 3466895 at *1. There is

no mention of any separate "illegal tax" claim despite the fact that White's "First Claim for Relief" in the *Second Amended Complaint* is very similar to the "First Claim for Relief" in the *First Amended Complaint* in *Hehr*. CR000021; *Hehr* CR at 4-5. Similarly, in *Buckskin*, this Court described the plaintiffs' damage claims as inverse condemnation claims and nothing else. *Buckskin*, 154 Idaho at 494-496, 300 P.3d at 26-28. As with the instant case and *Hehr*, the *Complaint* in *Buckskin* contained substantially the same "First Claim for Relief." *Buckskin* CR at 4-5.

B. White's single cause of action is inverse condemnation based on an illegal tax.

The fact that White chose to divide her complaint into two "claims for relief" does not change the reality that there is only one central, underlying cause of action presented in this litigation (and, hence, a single application of the statute of limitations). White's case turns on a single question: Did the County act without authority in requiring developers like her to pay road fees to mitigate the impact of their developments? If the answer to that question is "yes," then the County would be obligated to return the $166,496 White paid to the County and, if the issue were not moot, White would be entitled to declaratory and/or injunctive relief as to those and any future road fees.

White's challenge is framed as a Dillon's Rule case—a unique type of taking rooted in Idaho's constitutional provisions dealing with taxation. Idaho is a Dillon's Rule state, *Caesar v. State*, 101 Idaho 158, 160, 610 P.2d 517, 519 (1980), meaning that the power to tax (found in Idaho Const. art. VII, § 6) is separate from the police power, is not self-executing, and must be conferred by the Legislature. *Idaho Building Contractors Ass'n v. City of Coeur d'Alene ("IBCA")*, 126 Idaho 740, 890 P.2d 326 (1995); *Brewster v. City of Pocatello*, 115 Idaho 502, 768 P.2d 765 (1988). White contends that local governments have no authority to impose road fees on

developers outside of the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216.[7]

The Dillon's Rule violation alleged by White is a different sort of regulatory taking than the *Nollan/Dolan* exaction variety (*Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994)) common in federal takings claims under the Fifth Amendment. The *Nollan/Dolan* cases require that exactions have a nexus and be in rough proportionality to the impact of the project for which approval is sought. There is no allegation here that the road fees imposed by the County lack nexus or proportionality to the transportation impacts of the development.[8]

The sole basis of White's suit is whether the road fees demanded by the County violate Idaho's constitutional provision regarding taxing authority. The taking and due process claims have no independent viability separate from the illegal tax premise. They are simply the consequence of the allegedly illegal tax.

In her *Second Amended Complaint*, White posed this question in various ways and requested various forms of relief. But it all comes down to the same question. That question was presented to the court in a cause of action commonly known as inverse condemnation.

An inverse condemnation case is simply a condemnation case in which the parties are reversed from the order in an ordinary condemnation case, with the landowner suing the

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[7] As the federal court correctly noted: "The County concedes it did not enact an IDIFA-compliant ordinance, because, at the time, the County believed in good faith that none was required." *Certification Order* at 4. Indeed, the County still believes that none is required. See footnote 4 at page 6. See also Resolution 11-6 (Dkt. 96-1, CR001107-10).

[8] To the contrary, White describes the fees as being charged for the "proportionate share of road improvement costs attributable to traffic generated by their development." *Second Amended Complaint*, ¶ 16 at p. 4 (CR000021); see also ¶¶ 12 and 14, 17.

government for compensation (and/or other relief) resulting from a taking.[9]

As the Court explained in *Rueth v. State* ("*Rueth I*"), 100 Idaho 203, 596 P.2d 75 (1982) (Bistline, J.), *appeal following remand*, *Rueth v. State* ("*Rueth II*"), 103 Idaho 74, 644 P.2d 1333 (1982) (McFadden, J.), an inverse condemnation action finds its basis in the self-executing constitutional provision on takings:

> In *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950) the Court stated tersely but accurately that that action, which sought damages for the permanent although intermittent flooding of the property owners' lands, was in essence "a condemnation suit in reverse." *Id.* at 177, 213 P.2d 911. The final paragraph of that opinion said this: "Because this is, in effect, a condemnation suit and the condemnor must bear all costs, costs are awarded (to) appellants." *Id.* at 179, 213 P.2d at 917. It is clear that the Court there considered that what is now popularly called an action in inverse condemnation is nevertheless a proceeding in eminent domain and the only difference is the reversed alignment of the parties. The Court there noted that "Article 1, Section 14 of the Constitution of Idaho, is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." *Id.* at 177, 213 P.2d at 915. The Court there reiterated what an earlier Court had said in *Bassett v. Swenson*, 51 Idaho 256, 5 P.2d 722 (1931), that this constitutional provision is self-executing, that is, "'No action of the Legislature further than providing the procedural machinery by which the right may be applied is necessary.'" *Id.*, 70 Idaho at 177, 213 P.2d at 915. The import of that holding is clear. Both the right to condemn and the right of the condemnee to just compensation are granted, not by the legislature, but by the Constitution. The Court in *Renninger*, supra, repeated the holding from *Bassett*, supra, that "'whether or not a right claimed under this provision of the Constitution is within the grant is held to be a judicial question to be determined by the

[9] "An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemnor." *Covington v. Jefferson Cnty,* 137 Idaho 777, 780, 53 P.3d 828, 831 (2002) (Trout, J.). "Inverse condemnation is a taking of private property for a public use without the commencement of condemnation proceedings." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 441, 915 P.2d 1, 3 (1996) (Schroeder, J.). "Inverse condemnation is 'a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.'" *Agins v. City of Tiburon*, 447 U.S. 255, 258 (1980) (quoting *United States v. Clarke*, 445 U.S. 253, 257 (1980)) (Powell, J.). "Such a suit is 'inverse' because it is brought by the affected owner, not by the condemnor." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 5 n. 6 (1984) (Marshall, J.).

> courts.'" *Id.* at 177, 213 P.2d at 915. In the ordinary situation the constitutional right to condemn is exercised by the party seeking to take private property. In the "reverse" situation the constitutional right to be paid just compensation is exercised by the property owner who brings the action, alleging that his property rights have been taken without payment.

Rueth I, 100 Idaho at 217-18, 596 P.2d at 89-90 (emphasis supplied).[10]

The point of all this is that inverse condemnation is simply a "shorthand description" (as the Court said in *Clarke*) for a self-executing cause of action that affords relief to persons alleging their property is being taken. In contrast, there is no "cause of action" for the abstract claim that

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[10] The U.S. Supreme Court offered similar commentary on the nature of inverse condemnation and the origin of the term, which is entirely consistent with what the Idaho Supreme Court has said:

> Although a landowner's action to recover just compensation for a taking by physical intrusion has come to be referred to as "inverse" or "reverse" condemnation, the simple terms "condemn" and "condemnation" are not commonly used to describe such an action. Rather, a "condemnation" proceeding is commonly understood to be an action brought by a condemning authority such as the Government in the exercise of its power of eminent domain . . . .
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> . . .
>
> . . . The phrase "inverse condemnation" appears to be one that was coined simply as a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted. As defined by one land use planning expert, "[i]nverse condemnation is '*a cause of action against a governmental defendant* to recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.'" D. Hagman, *Urban Planning and Land Development Control Law* 328 (1971) (emphasis added). A landowner is entitled to bring such an action as a result of "the self-executing character of the constitutional provision with respect to compensation. . . ." See 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev.ed.1972). A condemnation proceeding, by contrast, typically involves an action by the condemnor to effect a taking and acquire title. The phrase "inverse condemnation," as a common understanding of that phrase would suggest, simply describes an action that is the "inverse" or "reverse" of a condemnation proceeding.

United States v. Clarke, 445 U.S. 253, 255-57 (1980) (Rehnquist, J.) (emphasis original).

the government is charging illegal taxes. It is the allegation that the illegal taxes take property that opens the doors to the courthouse by providing standing and a functional cause of action.[11]

Inverse condemnation claims come in various forms. The most common are physical takings and the *Nollan/Dolan* variety of regulatory taking. The particular species of inverse condemnation involved here is a claim based on an alleged illegal tax. The federal court is mistaken in its assumption that an inverse condemnation claim can be separated from the illegal tax claim under Idaho law.

This Court, obviously, is not bound by the federal court's commentary on Idaho law. Nor is this Court bound to answer the certified question in the particular structure or format urged by the federal court. The County is aware of this Court's admonition:

> When the "question presented is a narrow one," as it is here, "[o]ur role is limited to answering the certified question." *Peone v. Regulus Stud Mills, Inc.*, 113 Idaho 374, 375, 744 P.2d 102, 103 (1987) (cautioning that "to now decide [extraneous matters] would result in an advisory opinion on a question not certified").

St. Luke's Magic Valley Regional Medical Center v. Luciani, 154 Idaho 37, 40, 293 P.3d 661, 664 (2013) (quotation marks and brackets original).

However, as noted by Justices Bistline and Huntley in their dissent in *Peone*, this Court had previously recognized its ability to reformulate a certified question. *Peone*, 113 Idaho at 388, 744 P.2d at 116 (citing *Toner v. Lederle Laboratories,* 112 Idaho 328, 732 P.2d 297 (1987)). Where the case involves important state law issues besides those specifically asked in the certified question, courts and commentators have advocated for the state court to address the issues.

> The certification process is the only opportunity for direct dialogue between a federal and a state court. We think it pointless to turn a

[11] A person who pays an unauthorized fee or tax to a governmental entity might also be able to assert a cause of action for conversion. However, such a claim would require a timely notice of claim under the Idaho Tort Claims Act, which was not served in this matter.

> deaf ear to all but the direct responses to formal questions where, as here, other important issues clearly are implicated. To do so would be to elevate form over substance, to ignore a helpful opportunity to interpret state law correctly, and to demean the principles of comity and federalism. "In the absence of a definitive ruling by the highest state court, a federal court may consider 'analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand,' taking into account the broad policies and trends so evinced." *Michelin Tires (Canada) Ltd. v. First National Bank of Boston,* 666 F.2d 673, 682 (1st Cir.1981) (quoting *McKenna v. Ortho Pharmaceutical Corp.,* 622 F.2d 657, 663 (3d Cir.1980)).
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> As two commentators recently have noted:
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> > [T]he ability of the answering court to reshape or add to the issues is necessary to further the goals of certification. The answering court may be best situated to frame the question for precedential value and to control the development of its laws. If state courts take offense at a poorly framed question, they may miss a genuine opportunity to settle state law on a particular point.
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> Corr & Robbins, *Interjurisdictional Certification and Choice of Law,* 41 Vand. L. Rev. 411, 426 (1988). *See also Martinez v. Rodriquez,* 394 F.2d 156, 159 n. 6 (5th Cir.1968) (form of certified question should "not . . . restrict the [state] Supreme Court's consideration of the problems involved and the issues as the Supreme Court perceives them to be in its analysis of the record certified . . ., [including] the Supreme Court's restatement of the issue or issues and the manner in which the answers are to be given, whether as a comprehensive whole or in subordinate or even *contingent* parts") (emphasis supplied); *St. Paul Fire & Marine Ins. Co. v. Caguas Federal Savings & Loan Ass'n of Puerto Rico,* 825 F.2d 536, 537 (1st Cir.1986) (welcoming the advice of the answering court "on any other question of Puerto Rican law material to this case on which it would like to comment").

Redgrave v. Boston Symphony Orchestra, 855 F.2d 888, 903 (1st Cir.1988).

In sum, this Court can and should answer the certified question in the context of Idaho law as it finds it.

II. WHITE'S CAUSE OF ACTION ACCRUED WHEN A SUBSTANTIAL INTERFERENCE WITH HER PROPERTY BECAME APPARENT.

The federal court instructed this Court how to approach its response to the certified question: "This [federal] Court is not asking the Idaho Supreme Court to address the accrual date for inverse condemnation claims." *Certification Order* at 11. However, as discussed in the prior section, this instruction is based on a misunderstanding of Idaho law. This Court cannot fairly and meaningfully answer the certified question without addressing the accrual date for inverse condemnation, because that is the underlying cause of action. Doing so is particularly important, because it is evident that the federal court misperceives Idaho law on the subject of the accrual date.

The parties agree that White's state-law taking claim (as opposed to her federal taking claim) is subject to Idaho Code § 5-224. Let us begin, then, with the words of that statute: "An action for relief not hereinafter provided for must be commenced within four (4) years after the cause of action shall have accrued." Idaho Code § 5-224 (emphasis supplied). Thus, if White's cause of action accrued before October 1, 2005, her lawsuit is untimely.

Indeed, in seven cases, this Court has stated that claims of inverse condemnation run from the time that a substantial interference with the subject property "becomes apparent." The seminal case is *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) (Thomas, J. pro tem.). In that case, the plaintiffs alleged a taking based on the city's expansion of an airport and the adverse effects of increased air traffic on plaintiffs' property. The Court stated:

> The actual date of taking, although not readily susceptible to exact determination, is to be fixed at the point in time at which the impairment, of such a degree and kind as to constitute a substantial interference with plaintiffs' property interest, became apparent.

Tibbs, 100 Idaho at 671, 603 P.2d at 1005 (emphasis supplied).[12]

The first case to quote *Tibbs* was *Rueth v. State*, 103 Idaho 74, 79, 644 P.2d 1333, 1338 (1982) (McFadden, J.). Like *Tibbs*, *Rueth* was an inverse condemnation case in which evaluating the extent of damages was at issue. Both cases, however, dealt with the question of when the taking occurs and, hence, have laid the foundation for determining when statute of limitations begins to run. In *Rueth*, the plaintiffs operated a dairy farm whose land had gradually become saturated due to a water diversion structure built by the Idaho Department of Fish and Game. The Court recited the guidelines set out in *Tibbs* and concluded that it was appropriate for the trial court to select the date of a meeting in which the parties recognized "the severity of the problem":

> Because of the gradual nature of the taking in this case, and because of the character of a taking through a rising groundwater table, it would have been impossible to pick a specific date on which it could be said clearly that the taking occurred. Nonetheless, the agreement of the Department of October 4, 1974, to remove the boards from the irrigation check structure represents a recognition of the severity of the problem, and the evidence supports this date as a reasonable one for purposes of fixing the date of actual taking.

Rueth, 103 Idaho at 79, 644 P.2d at 1338 (emphasis supplied).

The next case to quote *Tibbs* was *Intermountain West, Inc. v. Boise City*, 111 Idaho 878, 880, 728 P.2d 767, 769 (1986) (Donaldson, J.). This is the first time that the *Tibbs* guidance was applied in the context of the statute of limitations. The *Intermountain West* case was a downzoning case involving annexation in which a developer sued the city for issuing stop work orders. The Court rejected the inverse condemnation damage claims on the merits and under the statute of limitations. As to the latter, the Court said:

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[12] Curiously, the *Tibbs* case did not actually involve the statute of limitations. The case was an action for inverse condemnation where the impact on the neighboring property was gradual. The question in the case was how to value the decline in property value, and the reference to when the case arose was in the context of fixing the dates for determination of "the difference in the value of the property before and after the destruction or impairment of the access." *Tibbs*, 100 Idaho at 670, 603 P.2d at 1004.

> In any event, it is clear that appellant's claim in inverse condemnation is barred by the statute of limitations. Guidelines expressed by this Court in *Tibbs v. City of Sandpoint*, 100 Idaho 667, 603 P.2d 1001 (1979) tell us that a cause of action in an inverse condemnation case accrues "after the full extent of the plaintiff's loss of use and enjoyment of [the premises] become[s] apparent." *Id.* at 671 (quoting *Aaron v. United States*, 311 F.2d 798, 802, 160 Ct.Cl. 295 (Ct.Cl.1963)). The accrual of this action commenced no later than July 30, 1975, when the court issued an injunction against Intermountain.

Intermountain West, Inc. v. Boise City, 111 Idaho at 880, 728 P.2d at 769.[13] In other words, the Court found that the interference with the property must have been apparent by the time the city secured an order requiring *Intermountain West* stop work. Note that the Court said that the cause of action accrued "no later" than that date. There was no need for the Court to trace back the accrual date any earlier.

A decade later, in *Wadsworth v. Idaho Department of Transportation*, 128 Idaho 439, 443, 915 P.2d 1, 5 (1996) (Schroeder, J.), the Court quoted the *Tibbs* guidance once again. *Wadsworth* involved a cross-claim for inverse condemnation filed by a landowner against the Department of Transportation alleging that the agency's gravel excavation many years earlier caused his island to erode.

The Court quoted *Tibbs*, highlighting the words "becomes apparent" to emphasize this is when the cause of action accrues. *Wadsworth*, 128 Idaho at 442, 915 P.2d at 4. The Court also reiterated its holding in *Rueth*: "This Court held that a meeting between the parties was a 'recognition of the severity of the problem,' and fixed that date as the date of the actual taking." *Wadsworth*, 128 Idaho at 442-43, 915 P.2d at 4-5.

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[13] The quotation of *Tibbs* by the Court in *Intermountain West* was slightly inaccurate, but that error is of no consequence.

The Court concluded that, while Wadsworth may not have been aware of the full impact of the excavation when it occurred in 1962, the interference with his property interest must have been apparent when he filed a tort claim alleging specific damages in 1983—seven years before he filed suit. The Court summed up saying that the statute begins to run "when the impairment was of such a degree and kind that substantial interference with Wadsworth's property interest became apparent." *Wadsworth*, 128 Idaho at 443, 915 P.2d at 5.

The Court repeatedly cited to *Tibbs* in *McCuskey v. Canyon Cnty Comm'rs* ("*McCuskey II*"), 128 Idaho 213, 217-19, 912 P.2d 100, 104-06 (1996) (Trout, J.). In this case, the plaintiff claimed a temporary taking from the time Canyon County issued a stop work order to the time the Idaho Supreme Court voided the controlling ordinance in *McCuskey v. Canyon Cnty* ("*McCuskey I*"), 123 Idaho 657, 851 P.2d 953 (1993) (Bistline, J.). In *McCuskey II*, the Court explained that the statute began to run from the day the county interfered with his property, not the day the Court ruled the interference was illegal.

> In determining when the cause of action for an inverse condemnation claim accrues we note that while a taking is typically initiated when government acts to condemn property, the doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings. In such an informal taking this Court has decided that damages for inverse condemnation should be assessed at the time the taking occurs. The time of taking occurs, and hence the cause of action accrues, as of the time that the full extent of the plaintiff's loss of use and enjoyment of the property becomes apparent. In this case, McCuskey was fully aware of the extent to which Canyon County interfered with his full use and enjoyment of the property in question on November 13, 1986, the date that McCuskey was notified, via issuance of a stop-work order, that he could not build the convenience store.

McCuskey II, 128 Idaho at 216-17, 912 P.2d at 103-04 (citations omitted).

McCuskey had contended that the statute did not begin to run until the Court had ruled the county's zoning action illegal, because only then did he know the full extent of damages for the

temporary taking. The Court rejected this argument, explaining that the lack of quantification of the loss is not an excuse for delay in filing the lawsuit:[14]

> Moreover, it is well settled that uncertainty as to the amount of damages cannot bar recovery so long as the underlying cause of action is determined. Besides, although McCuskey may not have known the full extent of his damages at the time the stop-work order was issued, he would have known with certainty what they were once a taking had been finally adjudicated.

McCuskey II, 128 Idaho at 218, 912 P.2d at 105 (citation omitted). Thus, the Court's earlier quoted reference to knowing "the full extent of the plaintiff's loss" should be understood to mean that the clock begins to run when interference with plaintiff's property is sufficiently apparent that a cause of action has arisen, regardless of whether the full extent of damages is then known.

The *Tibbs* guidance was applied ten years later in *City of Coeur d'Alene v. Simpson*, 142 Idaho 839, 846, 136 P.3d 310, 317 (2006). In this case, the city filed suit seeking an injunction requiring a landowner to remove fences on lakefront property. The landowner counterclaimed under § 1983 for inverse condemnation. The Court found that the landowner's counterclaim was timely, despite the fact that the applicable ordinance had been on the books for more than four years. The Court explained that it was not the enactment of the ordinance but its application to the landowner that triggered the statute of limitations:

> A claim for inverse condemnation "accrues after the full extent of the impairment of the plaintiffs' use and enjoyment of [the property] becomes apparent." *Tibbs v. City of Sandpoint*, 100 Idaho 667, 671, 603 P.2d 1001, 1005 (1979) (quoting *Aaron v. United States*, 160 Ct. Cl. 295, 311 F.2d 798, 802 (1963)). In *Palazzolo [v. Rhode Island,* 533 U.S. 606, 608-09 (2001)], the United States Supreme Court held that a regulatory takings claim does not become ripe upon enactment of the regulation; indeed, it remains unripe until the

[14] Thus, in *McCuskey II*, the Court traced the starting point back earlier than the issuance of the stop work injunction in *Intermountain West*. The cases are not inconsistent, however. As noted above, it was not necessary for the Court in *Intermountain West* to look back any earlier than the stop work injunction.

> landowner takes the reasonable and necessary steps to allow the regulating agency to consider development plans and issue a decision, thereby determining the extent to which the regulation actually burdens the property.

Simpson, 142 Idaho at 846, 136 P.3d at 317.[15]

The *Simpson* Court concluded that the cause of action did not begin to run until the city initiated an enforcement action against the landowners. "More important, however, is the fact that the City brought this action in 1998 to require removal of the fences constructed by the Simpsons in 1997. The issue was joined at that time." *Simpson*, 142 Idaho at 846, 136 P.3d at 317.[16]

The *Tibbs* guidance was quoted once again in *Harris v. State, ex rel. Kempthorne*, 147 Idaho 401, 405, 210 P.3d 86, 90 (2009) (Burdick, J.). This case grew out of confusion over whether the State of Idaho owned mineral rights to sand and gravel on the Harris's property in Latah County. In 1983, the State Land Board determined that the State owned the mineral rights, informed the Harrises, and required them to enter into a mineral lease under which they made payments to the State for sand and gravel removed. In 1999, this Court determined in an unrelated case that the State did not own the rights. The State then informed the Harrises that they were relieved from the obligation to make further payments under the lease. The Harrises sued in

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[15] *Palazzolo* does not even deal with the statute of limitations. Rather, it applied the specialized ripeness test in *Williamson Cnty Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985) (Blackmun, J.). *Palazzolo* sets out the basic premise that *Williamson Cnty* ripeness requires that the landowner go through proceedings resulting in a final decision. *Palazzolo* also created, however, a futility exception making this unnecessary where the ordinance leaves no room for discretion. "While a landowner must give a land-use authority an opportunity to exercise its discretion, once it becomes clear that the agency lacks the discretion to permit any development, or the permissible uses of the property are known to a reasonable degree of certainty, a takings claim is likely to have ripened." *Palazzolo*, 53 U.S. at 620.

[16] This makes sense in this context, where the city initiates an enforcement action under an ambiguous statute involving prosecutorial discretion. Thus, it would seem that while it is true that mere enactment of an unconstitutional ordinance does not start the statute of limitations running, the statute could begin to run where a landowner initiated an application process under a statute that absolutely (facially) required a taking in every instance. But that is a question for another day.

inverse condemnation demanding reimbursement for payments already made. The Harrises contended that the statute of limitations should be suspended when the State misinformed them as to the ownership of the mineral rights. This Court affirmed the district court's ruling that there is no such exception. The Court then ruled that the statute of limitations on inverse condemnation ran from the day the plaintiffs first entered into the mineral lease with the State, not the time they made payments to the State under the lease. It said:

> We affirm the district court's determination that the full extent of the Harrises' loss of use and enjoyment of the property became apparent when they entered into the Mineral Lease. At that point in time, the impairment constituted a substantial interference with their property interest because they signed an agreement promising to pay royalties and rents on the sand and gravel. Therefore, the Harrises are barred from recovering under their inverse condemnation claim by I.C. § 5-224.

Harris, 147 Idaho 405, 210 P.3d 90. Since they signed the lease 16 years before bringing suit, there was no need for the Court to explore whether the statute might have begun to run even earlier (such as when they were first informed of the State's ownership). The Court found that the mineral lease, in any event, was sufficient to satisfy the *Tibbs* standard that the interference with their property "became apparent." *Harris*, 147 Idaho at 405, 210 P.3d at 90 (quoting *Tibbs*).

Thus, for 34 years, this Court has articulated a consistent guideline for when a cause of action arises and when the statute of limitations begins to run.[17] White does not discuss these

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[17] This Court has never questioned the "becomes apparent" rule in the context in which it applies. Note, however, that a special rule applies in the case of certain physical takings resulting from government construction projects. There, the statute does not begin to run until the construction project is complete. *C & G, Inc. v. Canyon Highway Dist. No. 4*, 139 Idaho 140, 75 P.3d 194 (2003) (Kidwell, J.). This is referred to as the "project completion rule." *C & G,* 139 Idaho at 146, 75 P.3d at 200. This rule makes sense where a government construction project will physically invade a person's property. In that situation, the landowner cannot stop the government from undertaking the construction project. Rather, the only issue is the amount of compensation due. Consequently, it makes sense to wait until the project is completed and the facts are clear. In contrast, in exaction cases, courts have the power to stop the exaction either before or after it takes place by invalidating the exaction condition. Hence, there is no need to wait until the exact dollar value of the exaction is known, and no reason to delay the accrual of a cause of action. Indeed, the *C & G* court specifically noted: "This analysis should not be taken as a reversal of *McCuskey*

authorities, instead focusing on the misguided theory that there is a separate "illegal tax" claim with a different accrual date. But Idaho is clear that a cause of action based on a regulatory taking of property arises when it becomes "apparent" that the property will be taken. There is no basis under Idaho law to argue that the rule is any different for takings based on an allegedly illegal tax than for any other sort of regulatory taking. Accordingly, the application of these authorities results in White's case being barred.

Although the County believes the better approach is to view White's case as encompassing a single cause of action, the same result would obtain if the Court applied the statute of limitations separately to the "illegal tax" and "inverse condemnation" claims. Both claims are tardy.

III. IN WHITE'S CASE, THE INTERFERENCE WITH HER PROPERTY BECAME APPARENT WHEN THE CUP ISSUED.

As discussed above, the statute of limitations begins to run when it becomes apparent that a party's property has or will suffer a substantial impairment. In White's case, her cause of action accrued when the CUP was issued, or, in the alternative, very soon thereafter. The basis for this conclusion begins with the CUP itself, which contains condition No. 6 stating "A Development Agreement shall be required with the Board of County Commissioners" (Dkt. 64-19, CR000395). This requirement was imposed in accordance with the County's then recently adopted Capital Improvement Program ("CIP"), which mandated road fees to mitigate the impacts of development.[18]

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where this Court refused to apply *Farber*'s project completion rule to determine when an inverse condemnation claim accrues." *C & G*, 139 Idaho 144, 75 P.3d 198.

[18] A copy of the entire CIP does not appear in the record. However, the critical portion of the CIP that sets out the fee structure for the region containing the White Cloud development is found at Dkt. 48-2, CR000080-81; Dkt. 64-18, CR000392-93. The CIP is also described in the *Valley County Master Transportation Plan*, Dkt. 64-5, CR000307-08.

This is not in dispute. White acknowledges that the road fee was imposed "pursuant to Valley County's implementation of a Capital Improvement Program ('CIP') and requirement that White enter into a Road Development Agreement ('RDA')." *Appellants' Brief* at 1. White further acknowledges: "Under the CIP, developers were required to pay a fee, construct in-kind improvements on existing roadways or dedicate rights-of-way in an amount calculated by the County's engineer to deal with impacts on county roads." *Appellants' Brief* at 2. The CIP is dated May 2005, more than four years before the *Verified Complaint* was filed on October 1, 2009 (Dkt. 1, CR000001).

As part of the CIP, the County developed a fee calculation specific to each region of the County, based on local road impacts from development. At the time the CUP issued, the regional fee calculation matrix for the White Cloud area had not been completed, but it was underway. A letter from the County Engineer, included in the Staff Report for the CUP decision, stated: "Valley County will require a Road Development Agreement (RDA) for this project. Valley County is in the process of developing a CIP for this area" (Dkt. 64-22, CR000402; Dkt. 69-2, CR000559).

Thus, at the time the CUP issued, White did not yet know the exact amount of money she would be charged for road fees. But she knew with certainty that fees would be imposed.

In any event, White's designated representative learned within four months—more than four years before the complaint was filed—what the fees would be for each lot. On August 24, 2005, Cody Jansen (employed by the County's Engineer) sent a copy of the draft RDA, with fees specified, to White's agent, Secesh Engineering.[19] *Declaration of Cody Janson* at 3, ¶ 6 (Dkt.

[19] Secesh Engineering was White's designated engineer and representative before the Planning and Zoning Commission. Secesh's name appears on the CUP/Preliminary Plat Application, Dkt. 69-1 CR000523. Indeed, it was Secesh itself who submitted CUP/Preliminary Plat Application, Dkt. 69, Exh. A, CR000522. Throughout the application process, Secesh acted on behalf of White in her dealings with the

104-1, CR000887); Draft RDA (Dkt. 104-1, CR000889-92). The draft RDA called for road fees of $3,784 per lot. This is identical to the amount per lot charged in the RDA that White signed on June 26, 2006. (The total dollar number changed only because the number of lots changed.) Thus, it was clear when the CUP was issued on May 24, 2005 that road fees would be required. And it was soon known exactly what those fees would be per lot.[20]

But even if the exact fee were not known, it makes no difference. The amount of the fee is irrelevant to the constitutional question of whether the charge is a lawful fee or an illegal tax. Hence, the cause of action accrues as soon as it is known that a fee will be charged—*i.e.*, that there will be a substantial impairment of property. White's sole argument is that the County failed to comply with the Idaho Development Impact Fee Act ("IDIFA"), Idaho Code §§ 67-8201 to 67-8216, which makes its road fee an illegal tax and a *per se* taking under *BHA Investments, Inc.*

County. For example, the Minutes of the Planning and Zoning Commission hearing on the development state: "Chairman Somerton asked for the presentation from the applicant. Jim Fronk, Secesh Engineering, came forward and presented to the Commission . . . ." Dkt. 91-6, CR000819. Further documentation of the agency relationship is found in the *Declaration of Cynda Herrick Regarding Secesh Engineering* and accompanying exhibits (Dkt. 120 through 120-15, CR001113-93).

It is black letter law that knowledge acquired by an agent during the course of the agency relationship is imputed to the principal so long as the agent did not have any interest adverse to the principal. *Mason v. Tucker and Associates*, 125 Idaho 429, 433, 871 P.2d 846, 850 (1994) (citing *Kidwell v. Master Distributors, Inc.*, 101 Idaho 447, 458, 615 P.2d 116, 127 (1980) and *Williams v. Continental Life & Accident Co.*, 100 Idaho 71, 72-73, 593 P.2d 708, 709-10 (1979)). In *Mason*, the plaintiff argued that the statute of limitations on his claim should have been tolled based upon equitable estoppel. The Court held that, even if the elements of equitable estoppel applied, it would only toll the statute until the plaintiff had actual knowledge of facts giving rise to his claim. The Court further held that the knowledge of the claim possessed by his attorney was imputed to him, and that the record showed that the attorney had such knowledge outside of the limitations period. *Mason*, 125 Idaho at 433-34, 871 P.2d at 85-51.

[20] The federal district court found that the cause of action did not accrue until the final RDA was signed because "[i]t would be against basic contract principles to say just because one side has provided a draft agreement, there are no further negotiations and the parties are fully aware of all terms." *Memorandum Order* at 25 (Dkt. 128, CR000961). With due respect to the federal court, the accrual of a cause of action for inverse condemnation does not turn on principles of contract law. This Court has repeatedly explained that the cause of action accrues when it becomes "apparent" that the government intends to require something. That is a one-way communication. As White has acknowledged, there was no doubt at the time of the CUP that substantial fees would be charged and that they would be based on the County's CIP matrix. Notably, even White has not adopted or pursued the federal court's contract-based line of reasoning in her briefing before this Court.

v. City of Boise ("*BHA I*").[21] That is a question that could and should have been presented once it became apparent that White would be required to pay a road fee. Indeed, the fact that no further information or quantification is required is evident in the fact that White herself sought declaratory and injunctive relief regarding future fees for Phase II. In fact, White's claims as to the entire project (which was covered by a single CUP) were ripe all along, and the clock has been running since the CUP was issued.

IV. WHITE CANNOT RE-START THE CLOCK BY RE-FRAMING THE RELIEF SOUGHT.

White makes key concessions that should simplify the decision on this certified question. She begins by correctly describing the County's argument, and then adds an important concession:

> The County maintains that the accrual date should be the date the CUP was granted because at that time it was 'apparent' White would be required to pay some amount. Although White would have had a legal injury at the time the CUP was granted, her legal injury at that time would have only sustained a cause of action for whether the conditioning of CUP approval on the payment of an impact fee was legal or illegal.

Appellants' Brief at 9 (emphasis supplied).

Thus, White acknowledges, as she must, that she had a ripe cause of action at the time of the CUP to obtain declaratory or injunctive relief as to "whether the conditioning of CUP approval on the payment of an impact fee was legal or illegal." *Appellants' Brief* at 9. Yet she insists that the clock runs separately on each count[22] and that she can avoid the statute of limitations by

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[21] The purely legal nature of White's challenge is made clear in her complaint. For example, she states: "Valley County's practice of requiring developers to enter into a Road Development Agreement (or any similar written agreement) solely for the purpose of forcing developers to pay for money for its proportionate share of road improvement costs attributable to traffic generated by their development is a disguised impact fee, is illegal and therefore the practice should be enjoined." *Second Amended Complaint*, Dkt. 41, ¶ 16 at p. 4, CR000021. There is no suggestion that the fees are not "proportionate" –which would raise a *Dolan* issue.

[22] "In this case, the answer to this certified question should be determined on the remedy being sought by White." *Appellants' Brief* at 8.

separately pleading a "claim for a refund based on her payment of the illegal impact fee [which is] a separate injury and calls for a different remedy that did not accrue until the illegal tax was paid." *Appellants' Brief* at 9.

Why would that be? White says it is because a cause of action seeking a refund of money paid is not ripe until the money has been paid. Well, that is true—and rather obvious. But it is quite a leap to get from that truism to the conclusion that White was free to wait until sometime after she had paid the allegedly illegal fees and then re-frame the lawsuit as one for damages. By analogy, a personal injury claim accrues (and the claim is ripe) when the plaintiff sustains some damage, not when a medical bill is paid.

If White had filed in a timely fashion when it became apparent that a fee would be charged, she might have obtained relief without ever having to pay the fee. For that matter, if she had prevailed in a timely suit filed after fees had been paid, or if the fees were paid during the course of litigation, the County would have been obliged to return them.[23] In any event, she did not need to wait to ripen her claim. Her claim was always ripe all along, even if the nature of the relief might change as events unfolded. White's contention that she is free to miss the deadline for challenging the fee and that she is entitled to a second chance by re-framing the litigation as one for damages is too obvious a ruse. It misses the whole point and policy of the statute of limitations.[24]

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[23] As a practical matter, effective relief is available under a judicial review as well as a civil action. While LLUPA does not provide for damages as such, a court hearing a matter on judicial review has the power to declare the fee to be illegal. If that occurred, the entity imposing the fee would be obligated to return the money illegally taken, and there are plenty of mechanisms to enforce that in the highly unlikely event that the city or county required further prodding.

[24] "'The policy behind statutes of limitations is protection of defendants against stale claims, and protection of the courts against needless expenditures of resources.' *Johnson v. Pischke*, 108 Idaho 397, 402, 700 P.2d 19, 25 (1985). Statutes of limitation are designed to promote stability and avoid uncertainty with regards to future litigation." *Wadsworth v. Idaho Dep't of Transportation*, 128 Idaho 439, 442, 915 P.2d 1, 4 (1996).

This Court addressed much the same issue in *Buckskin*. There, the plaintiffs said they were not bound to exhaust administrative remedies under the Local Land Use Planning Act ("LLUPA"), Idaho Code §§ 67-6501 to 67-6538, because doing so would not have provided the relief sought. The Court made fast work of that argument:

> Buckskin's claim that judicial review would not have provided the relief it sought is also without merit. Had Buckskin truly objected to the CUP condition, and had it successfully challenged the condition and the validity of the CCA on judicial review, it might have been able to avoid paying the road impact charges for all six phases of The Meadows.

Buckskin, 154 Idaho at 493, 300 P.3d at 25. The same should apply to White.

Actually, White said it well in her own brief. "Ripeness is a fundamental prerequisite to invoke a Court's jurisdiction—a harm must be sufficiently matured to warrant judicial intervention." *Appellants' Brief* at 9. The harm was sufficiently matured when the CUP was issued. There was no need to know whether the fee would be for X dollars or Y dollars. Whether the County had the authority to impose fees at all for this purpose is a question of law that could have been determined at any time. White cannot restart the clock by tweaking the form of relief requested to address events that might have been avoided by bringing a timely suit.

V. THERE IS NO REASON TO DEPART FROM IDAHO LAW BASED ON DECISIONS OF OTHER STATES.

A. The foreign cases relied on by White are inapposite.

White asserts that her claim cannot accrue until "the impact fee is collected." *Appellants' Brief* at 6, 10. That would be July 21, 2006, the date her agent wrote a check to pay the road fees. Dkt. 1-3, CR000015; Dkt. 96-2, CR001112. White cites no authority on this from Idaho. Instead, she urges the Court to jettison its own precedent and adopt a more favorable rule from other states. However, the foreign case law she presents is inapposite.

In *Sundance Homes, Inc. v. County of DuPage*, 746 N.E.2d 254 (Ill. 2001), the Illinois Supreme Court upheld a decision finding the plaintiffs' class action barred by the five-year statute of limitations. The plaintiffs were payers of a road impact fee imposed by statute and ordinances that were subsequently determined to be unconstitutional.[25] The illegal fees were collected by the county more than five years prior to the commencement of the action but less than five years after the decision that struck down the fees. The plaintiffs argued that their claims did not accrue until the fees were declared to be unconstitutional. DuPage County argued that the claims accrued when the fees were paid. The Illinois Supreme Court applied standards akin to Idaho's:

> Courts of this state have held that a statute of limitation begins to run when the party to be barred has the right to invoke the aid of the court to enforce his remedy. *Milnes v. Hunt,* 311 Ill.App.3d 977, 980, 244 Ill. Dec. 306, 725 N.E.2d 779 (2000); *Rohter v. Passarella,* 246 Ill.App.3d 860, 869, 186 Ill. Dec. 807, 617 N.E.2d 46 (1993). Stated another way, a limitation period begins "when facts exist which authorize one party to maintain an action against another." *Davis v. Munie,* 235 Ill. 620, 622, 85 N.E. 943 (1908); *Bank of Ravenswood v. City of Chicago,* 307 Ill.App.3d 161, 167, 240 Ill.Dec. 385, 717 N.E.2d 478 (1999).

Sundance, 746 N.E.2d at 260.

While acknowledging that an impact fee is not the same as a tax, the court found instructive Illinois and federal cases holding that illegal tax claims accrue when the tax is paid rather than when the plaintiff learns that the payment was erroneous. *Id.* at 260-61. Because the fee payers could have challenged the legality of the impact fees at the time they paid them, the court held that their causes of action accrued at that time regardless of the fact that the fees were not declared to be unconstitutional until years later. *Id.* at 262.

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[25] The impact fees were struck down in a separate action in which the court held that the fees collected should be returned. However, Sundance and the other class members were not parties to that action.

There are two reasons why *Sundance* is inapplicable here. The first is that the *Sundance* court did not need to look back in time any further than the date of payment. Indeed, the county itself argued that the accrual date was the date of payment. The question in *Sundance* was whether the accrual of the actions was delayed until the fees were declared to be illegal. Here, there is no argument by either party that the claims do not accrue until there is a decision on the merits. Instead, the question is whether the claims accrued when the requirement to pay became apparent due to condition 6 of the CUP or when the payment was actually made. That question was not considered by the *Sundance* court.[26]

The second difference between *Sundance* and the instant case is that the impact fees were imposed by statute and ordinance rather than by the county's approval of an application, as is the case here. In *Sundance*, as with typical tax refund cases, the obligation to pay the fees was not tied to a CUP or other administrative or permitting decision. The applicable statute or ordinance spelled out how much and when to pay. This is in contrast to the instant case in which White made her payment in satisfaction of a requirement imposed when the CUP was issued.

This is the same reason that White's reliance on *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 23 P.3d 601 (Cal. 2001) is misplaced. In that case, the California Supreme Court held that the plaintiffs' claims for declaratory and injunctive relief based upon the city's continued

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[26] *Venture Coal Sales Co. v. U.S.*, 370 F.3d 1102 (Fed. Cir. 2004), *Kuhn v. State, Dept. of Revenue*, 897 P.2d 792 (Colo. 1995), and *Bainbridge v. Riverside County*, 334 P.2d 625 (Cal. Ct. App. 1959) also stand for the unremarkable proposition that a subsequent court decision finding a statute or ordinance unconstitutional does not create a new action or otherwise extend the limitations period. Indeed, this Court said the same thing: "The phrase 'reasonably should have been discovered' refers to knowledge of the facts upon which the claim is based, not knowledge of the applicable legal theory upon which a claim could be based." *BHA Investments, Inc. v. City of Boise* ("*BHA II*") (Eismann, J.), 141 Idaho 168, 174 108 P.3d 315, 321 (2004) (Eismann, J.) (in context of notice required under tort claims act). See also, *McCuskey II*, 128 Idaho at 218, 912 P.2d at 105, in which this Court rejected the plaintiff's contention that the statute of limitations for temporary takings did not begin to run until the court declared that the zoning action was unconstitutional.

collection of an illegal general tax were not barred by the applicable statute of limitations despite being filed more than three years after the ordinance was enacted. The court reasoned that the plaintiffs would have timely claims for refunds of the taxes collected (even though those claims were not being pursued) within the three-year limitations period and therefore could also bring declaratory and injunctive relief claims based on the continued collection of the taxes. *Howard Jarvis*, 23 P.3d at 608-09. Again, as in *Sundance*, the claims in *Howard Jarvis* were not based upon an obligation specifically imposed upon a particular plaintiff.

The *Howard Jarvis* court was careful to distinguish the decision in *Ponderosa Homes, Inc. v. City of San Ramon*, 29 Cal.Rptr 2d 26 (Cal. Ct. App. 1994), in which a developer's claim for a refund of a traffic mitigation fee was held to accrue on the date that the development was conditionally approved rather than when the fee was paid. The *Howard Jarvis* court explained:

> In *Ponderosa Homes, Inc. v. City of San Ramon* (1994) 23 Cal.App.4th 1761, 1769-1771, 29 Cal. Rptr. 2d 26, the appellate court held that a city "imposed" a traffic mitigation fee on a developer when the development was conditionally approved rather than when the developer paid the fee. The decision is inapposite, both because of the differing statutory context (the statute of limitations there expressly ran from "imposition" [see *id.* at pp. 1768–1769, 29 Cal.Rptr.2d 26]) and because plaintiffs here maintain that the City continues to impose the tax by requiring service providers to collect it, not that plaintiffs' payment of taxes constituted imposition by the City.

Howard Jarvis, 23 P.3d at 610.[27]

In the instant case, as in *Ponderosa Homes*, the challenged fee was imposed when it was made a condition of approval of the development. While the state statute that was applicable in *Ponderosa Homes* played a part in the court's analysis, the same result obtains from the

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[27] One basis for the court's decision in *Ponderosa Homes* was that the applicable limitations statute provided that the period ran from the "imposition" of the fee. However, as acknowledged by White, the *Ponderosa Homes* court applied the same accrual date for the plaintiff's federal claims, which were not subject to that statute.

application of Idaho law concerning the accrual of actions. White was damaged and had a viable cause of action the instant that the CUP was approved with the requirement to enter into an RDA. The fact that White later made the required payment does not create a new action.

Paul v. City of Woonsocket, 745 A.2d 169 (R.I. 2000) involved a water connection fee rather than a tax, but the analysis of accrual was the same as in *Sundance* and *Howard Jarvis*. The *Paul* court first held that the plaintiffs' state law claims were untimely because they did not comply with a state statute that required the filing of a challenge to a tax within three months of the last day appointed for the payment of the tax without penalty. *Paul*, 745 A.2d at 171. As to the plaintiffs' federal claims, brought under 42 U.S.C. § 1983, the court applied Rhode Island's three-year statute of limitations for personal injury actions. The court held that each plaintiff's claim accrued on the date of the payment of the fee, which made all of the claims untimely. *Paul*, 745 A.2d at 172. Again, the court did not need to answer the question of whether the accrual actually occurred earlier. Further, the fee became due and was paid at the same time—when the property owner applied for a permit to connect to the water system. There was no prior regulatory condition creating the obligation.

White claims support for her argument that the claim accrued when payment was made in *Lowenberg v. Dallas*, 168 S.W.3d 800 (Tex. 2005), but the case is inapposite. In *Lowenberg* the plaintiff mounted a class action challenge to an ordinance requiring all commercial property owners to pay a "fire registration fee." *Lowenberg*, 168 S.W.3d at 800. The City contended that the statute of limitations ran from the time of enactment of the ordinance. The Texas court said that would be true if this had been a regulatory taking (because it was a facial challenge to an ordinance). But in the Texas case there was no *quid pro quo* exaction. Indeed, it was not a regulatory taking at all. Rather, the plaintiff challenged a fee imposed unilaterally on all

commercial property owners. Thus, it was a physical taking, and a different rule applied. The court ruled that in this type of physical taking, the taking occurs at the time payment is made. *Lowenberg*, 168 S.W.3d at 802.

This case does nothing to advance White's cause. In the instant case, no statute or ordinance is being facially challenged. Indeed, no statute or ordinance provides the basis for the County's road fees. Moreover, unlike the fee imposed across-the-board on an entire class of property owners in *Lowenberg*, the instant case involves a regulatory taking—a *quid pro quo* exaction in which White was told that if she wants to get something (the right to develop her property) she must give something (pay road fees). Accordingly, even the Texas precedent would recognize that the key event is not the payment of the fee but the imposition of the obligation. In White's case, she had a viable cause of action when it became clear that the fee would be required. The actual payment does not create or add to the injury. White, by her own allegations, was damaged when the obligation to contribute toward off-site road improvements was made a condition of approval. That occurred on the date that the CUP was issued and White could have sued even before payment was made.[28]

In sum, the foreign cases relied on by White do not address the question presented here. Three addressed whether the onset of the statute of limitations is delayed until there is a judicial determination that a impact fee is unlawful (*Sundance Homes*, *Venture Coal*, and *Kuhn*). Two involved whether a cause of action for a facial challenge to unconstitutional ordinances accrues on

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[28] White cites one additional case in support of its proposition that the statute of limitations runs from the date of payment—*Wats Marketing of America, Inc. v. Boehm*, 494 N.W.2d 527 (Neb. 1993). While White accurately describes the result reached by the court in that case, White fails to mention that the claims were subject to two state statutes that specifically provided that actions for the recovery of taxes collected that are later deemed to be unconstitutional must be brought within one year of the final decision declaring the tax to be unconstitutional and further provided for a refund of taxes paid for the year in which the tax is determined to be illegal. *Wats Marketing*, 494 N.W.2d at 530-31. These somewhat peculiar statutory provisions make *Boehm* wholly inapplicable and uninstructive.

passage of the illegal ordinance (*Sundance Homes* and *Howard Jarvis*). Three involved traditional taxes or service fees imposed on all comers, not regulatory takings imposed as conditions of development (*Howard Jarvis*, *Paul*, and *Lowenberg*). Two involved situations in which the court simply did not need to look back any further than the date the fee was paid, because that date was outside the statute of limitations (*Sundance Homes* and *Paul*).

B. The other out-of-state cases cited by White support the County's position.

The *Ponderosa Homes* decision, as discussed above, is supportive of the County's position. There the court noted that "Ponderosa's subsequent payment of the fee in connection with processing the phased final maps simply constituted the satisfaction of the condition already imposed." *Ponderosa Homes*, 23 Cal.App.4th at 31. That sums it up nicely, and the same can be said about White. Her injury arose not when she paid the fee, but when the obligation was imposed in the CUP and CIP. Although the court in *Ponderosa Homes* was applying a specialized limitations statute, its analysis of the accrual date applies broadly. Indeed, the court applied the same analysis to the ordinary, one-year statute of limitations applicable to plaintiffs' federal claims. *Ponderosa Homes*, 29 Cal.Rptr.2d at 31-32.

In *Fredrick v. Northern Palm Beach County Improvement Dist.*, 971 So.2d 974 (Fla. Dist. Ct. App. 2008), plaintiffs challenged assessments and impact fees for road improvements 14 years after they were imposed. Plaintiffs said the statute of limitations should not begin running until they received notice of certain irregularities. *Fredrick*, 971 So.2d at 979. The Florida court rejected this argument, noting prior rulings in which the Florida court "concluded that municipalities need certainty in their economic affairs and that 'policy decisions should not be subjected to perennial review.'" *Id.* at 980. The court concluded: "As a result, the approval and creation of the assessments and impact fees here by the District provided sufficient notice to then

existing and future homeowners of their obligations. This is true even if the assessments and impact fees were improperly levied." *Id.* The same can be said here.

White goes on to suggest that adopting the rule from *Fredrick* and *Ponderosa Homes* would be unfair to land use applicants because it would prevent them from challenging a fee if the application was submitted four years after the assessment was adopted by the governmental entity, and that cities and counties could circumvent IDIFA by collecting impact fees and hoping that nobody challenged the fees within four years. *Appellants' Brief* at 13. White's alarmist response is unfounded. This case involves a challenge to an allegedly illegal fee imposed as a condition of approval on a land use application. Idaho law clearly provides the procedure for challenging such a condition. There is nothing unfair about requiring a land use applicant to follow Idaho law by raising objections in a timely fashion. There is no basis for the suggestion that future applicants subjected to similar conditions would be barred from seeking relief.

VI. IN ANY EVENT, THE APPLICABLE LIMITATIONS PERIOD IS THE 28-DAY PERIOD SET FOR JUDICIAL REVIEW AND/OR A REGULATORY TAKING ANALYSIS.

A. The 28-day deadline overrides the four-year deadline.

White makes an interesting observation in her brief. In her effort to distinguish the case of *Ponderosa Homes*, she noted that "the California law on this issue has been legislatively preempted in this area." *Appellants' Brief* at 11-12. Although the California court did not use the term preemption, White's characterization of the holding is conceptually correct. The California court spoke in terms of determining which statutorily imposed time period is "the applicable limitations period." *Ponderosa Homes*, 29 Cal. Rptr. 2d at 28.

Ponderosa Homes, by the way, bears striking similarity to the case at bar in that the plaintiff challenged a traffic mitigation fee of $3,200 per residential lot imposed by the city as a condition of development, contending that it was an "illegal special tax." *Ponderosa Homes*, 29

Cal. Rptr. 2d at 27. The developer did not object, however, until the third phase of the project when, like here, it suddenly dawned on him that the fee was illegal—thanks to a favorable result obtained in another lawsuit by another developer.[29]

The court found that the applicable limitations period was a 180-day deadline set for bringing a legal challenge to a development exaction. Cal. Gov't 66020(d)(2).[30] California has other statutes of limitation. For example, in *Ponderosa Homes*, California's one-year statute of limitations governed the plaintiff's § 1983 action. However, the more specialized statutory provision governing development approvals was the limitations period applicable to Ponderosa Home's state law claims.

The same is true here. While White's federal claims are subject to the two-year statute of limitations applicable to § 1983 claims, her state law claims are subject to the more specialized 28-day limitations period set out in the judicial review provisions of LLUPA and/or the Idaho Regulatory Taking Act, Idaho Code §§ 67-8001 to 67-8004. In other words, all the discussion above about the trigger date for the four-year statute of limitations is really academic. The applicable limitations period is not four years, but 28 days.

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[29] As in *Buckskin* and *Alpine Village*, the case at bar is an after-the-fact, copycat lawsuit seeking to ride the coattails of timely challenges to impact fees in *Mountain Central Bd. of Realtors, Inc. v. City of McCall*, Case No. CV 2006-490-C (Idaho, Fourth Judicial Dist., Feb. 19, 2008) (Thomas F. Neville, J.) (striking down McCall's affordable housing fee ordinance); *Cove Springs Development, Inc. v. Blaine Cnty,* Case No. CV2008-22 (Idaho, Fifth Judicial Dist., June 3, 2008) (Robert J. Elgee, J.) (declaring unlawful and unconstitutional various exaction and comprehensive plan ordinance provisions); and *Schaefer v. City of Sun Valley*, Case No. CV-06-882 (Idaho, Fifth Judicial Dist. July 3, 2007) (Robert J. Elgee, J.) (striking down Sun Valley's affordable housing fee ordinance).

[30] The California statute appears to have been amended slightly subsequent to the decision in *Ponderosa Homes*, but this is of no consequence to the discussion here.

Since 1975, LLUPA has authorized judicial review of certain permitting decisions—including CUPs and final plats—identified in Idaho Code §§ 67-6519(4) and 67-6521(1).[31] LLUPA, in turn, references and relies on the judicial review provisions of the Idaho Administrative Procedures Act, Idaho Code § 67-5279(3).

Alternatively, White could have hit the pause button on the judicial review by seeking a regulatory taking analysis under Idaho Code § 67-6512(a) (a LLUPA provision that keys into the section 67-8003(2) of the Idaho Regulatory Taking Act. That deadline, however, is also 28 days.

Instead of appealing or requesting a regulatory taking analysis, White signed the RDA and proceeded with her development. She thus passed on both opportunities provided by the Legislature to challenge the road fees. As this Court ruled in *Buckskin* (on facts very similar to these), LLUPA's judicial review provisions are exclusive.[32] "As the County points out, Buckskin failed to seek judicial review of the requirement in its CUP that the CCA [equivalent of the RDA here] received the County Board's approval. If Buckskin truly was aggrieved by this requirement, it had the ability to seek judicial review. By failing to do so, it cannot now complain." *Buckskin*, 154 Idaho at 493, 300 P.3d at 25.

This follows directly the precedent set in *Bone v. City of Lewiston,* 107 Idaho 844, 847-48, 693 P.2d 1046, 1049-50 (1984) (Bistline, J.) (civil action challenging re-zone was an improper end run around judicial review); *Curtis v. City of Ketchum*, 111 Idaho 27, 720 P.2d 210 (1986)

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[31] Neither the 2010 amendment to LLUPA, 2010 Idaho Sess. Laws ch. 175, nor the Court's decision in *Giltner Dairy v. Jerome County*, 145 Idaho 630, 633, 181 P.3d 1238, 1241 (2008) and its progeny changed the availability of judicial review for CUPs and final plats. Both were reviewable before and remain reviewable today under LLUPA.

[32] There are limited exceptions to the exclusivity rule, none of which is applicable here, just as they were not applicable in *Buckskin*. For example, in *McCuskey v. Canyon Cnty* ("*McCuskey I*"), 123 Idaho 657, 660, 851 P.2d 953, 956 (1993) (Bistline, J.). the Court held that a party may bypass judicial review where it brings a facial challenge to an ordinance. Here, there was no ordinance mandating or directing the CIP or RDA process. The CIP and each RDA were adopted and applied on an ad hoc basis without any basis in ordinance.

(Bakes, J.) (denial of subdivision should have been challenged by judicial review, not civil action); and *Regan v. Kootenai Cnty,* 140 Idaho 721, 725, 100 P.3d 615, 619 (2004) (Schroeder, J.) (plaintiff should have brought a LLUPA appeal rather than seeking declaratory action to address the county's interpretation of a zoning ordinance).[33]

Courts in other jurisdictions have followed the same approach. In *Sold, Inc. v. Town of Gorham*, 868 A.2d 172 (Maine 2005), the Supreme Judicial Court of Maine considered a declaratory judgment action brought by a group of developers who had paid impact fees under an allegedly illegal ordinance (alleging an unconstitutional taking among other things). The court held that the action was barred by the plaintiffs' failure to challenge the city's approval of their subdivisions, which included the payment of the impact fees as a condition, within 30 days as provided under state law. "When the time to file an appeal expired, the conditional approvals, including the impact fee requirements, became final, and were not subject to challenge." *Sold Inc.* at 176 (citation omitted).

Similarly, in *James v. Cnty of Kitsap*, 115 P.3d 286 (Wash. 2005), the Washington Supreme Court addressed claims from developers who sought refunds of impact fees paid during the time that the county's ordinances were not in compliance with state law. In *James*, the county appealed from a summary judgment that awarded the developers more than three million dollars in refunds arguing, inter alia, that the developers' claims were barred by their failure to challenge the fees within 21 days of when the permits were issued, as required under Washington's Land Use Petition Act ("LUPA"). The *James* court agreed with the county. "[W]e find that the imposition

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[33] The exclusivity of judicial review is not unique to LLUPA. In *Cobbley v. City of Challis*, 143 Idaho 130, 133-34, 139 P.3d 732, 735-36 (2006) (J. Jones, J.), this Court held that a petition for judicial review pursuant to Idaho Code § 40-208 (the public road statute) is the exclusive means to challenge a county's decision concerning the validation of a road. Citing *Bone*, the Court reiterated that, when provided, statutory judicial review proceedings are exclusive remedies.

of impact fees as a condition on the issuance of a building permit is a land use decision and is not reviewable unless a party timely challenges that decision within 21 days of its issuance." *James* at 292. The court's reasoning is equally applicable here:

> The Developers here were provided, by statute, with several avenues to challenge the legality of the impact fees imposed by the County and comply with the procedural requirements under chapter 82.02 RCW and LUPA. . . . However, rather than complying with either of these procedures provided by statute, the Developers waited almost three years before challenging the legality of the impact fees imposed by the County. The Developers have not complied with the procedures provided under LUPA and RCW 82.02.070(4) and are barred under LUPA from challenging the legality of the fees imposed.

James at 293-94. What the court said about the policy underlying the requirement resonates here:

> [T]his court has long recognized the strong public policy evidenced in LUPA, supporting administrative finality in land use decisions. 146 Wash.2d at 931–32, 52 P.3d 1. The purpose and policy of the law in establishing definite time limits is to allow property owners to proceed with assurance in developing their property. Additionally, and particularly with respect to impact fees, the purpose and policy of chapter 82.02 RCW in correlation with the procedural requirements of LUPA ensure that local jurisdictions have timely notice of potential impact fee challenges. Without notice of these challenges, local jurisdictions would be less able to plan and fund construction of necessary public facilities. Absent enforcement of the requirements under chapter 82.02 RCW and LUPA, local jurisdictions would alternatively be faced with delaying necessary capacity improvements until the three-year statute of limitations for challenging impact fees had run.

James at 294.

Obviously, these out-of-state cases applied their own statutes. They are of interest here only to the extent the Court finds their reasoning compelling. The County offers them, however, because it believes their reasoning is compelling and entirely consistent with this Court's treatment of the subject.

B. The exception to the exhaustion requirement under Idaho Code § 67-6521(2)(b) has no application here.

In *Buckskin*, the Court said that the plaintiff's failure to seek timely judicial review was not the end of the story because there was the possibility that the plaintiffs "may also have had the ability to assert an inverse condemnation claim." *Buckskin*, 154 Idaho at 494, 300 P.3d at 26. It was possible, the Court explained (without deciding) that the plaintiffs' inverse condemnation claim might be exempt from exhaustion requirements (and thus not subject to the 28-day deadline) due to an exception provided for inverse condemnation claims in Idaho Code § 67-6521(2)(b).

As the *Buckskin* Court noted, the section 67-6521(2)(b) exception was not raised by the plaintiff. Nor has White raised it here. The County, however, addresses it in order to put the issue to rest.

In short, the provision is not applicable to White's claim and provides no protection to White from the 28-day rule. This is a very narrow exception that applies only to challenges based on the allegation that an alleged taking is not for a public purpose. This Court has noted before that this provision does not apply to all regulatory takings actions. "It only applies if the basis of the inverse condemnation claim is that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed necessary to complete the development of the material resources of the state, or necessary for other public uses." *KMST, LLC v. County of Ada*, 138 Idaho 577, 583, 67 P.3d 56, 62 (2003) (Eismann, J.) (internal quotations omitted).

The statute reads:

> (2)(a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.
>
> (b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a final action

> restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code [dealing with eminent domain].

Idaho Code § 67-6521(2) (as amended in 2010).[34]

The effect of the statute is to exempt from the judicial review provisions a party who alleges a taking and seeks a "determination of whether the claim comes within the defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain." The referenced constitutional provision authorizes governmental entities and even private parties to condemn the property of others for any "use necessary to the complete development of the material resources of the state," which uses are "declared to be a public use." This sweeping power—which may be exercised by one private person against the property of another—has been recognized since 1906. *Potlatch Lumber Co. v. Peterson,* 12 Idaho 769, 88 P. 426 (1906); *Blackwell Lumber Co. v. Empire Mill Co.,* 28 Idaho 556, 155 P. 680 (1916), appeal dismissed, 244 U.S. 651. Constitutional provisions like this, allowing private property to be taken for other seemingly private uses (such as private development touted as urban renewal), have become increasingly controversial across the nation in the last few decades, culminating in the celebrated case of *Kelo v. City of New London*, 545 U.S. 469 (2005). The Idaho statute, which

[34] The provision was added in 1996, 1996 Idaho Sess. Laws ch. 199, and amended slightly in 2010, 2010 Idaho Sess. Laws ch. 175. The 2010 amendment was not substantive. It simply conformed the language to changes made elsewhere in LLUPA dealing with judicial review.

pre-dates *Kelo*, was enacted at a time of growing public alarm over what is perceived by many as use of eminent domain to promote private, rather than public, purposes.

The language of the statute is somewhat difficult to parse, and its purpose and effect are not intuitively apparent. Accordingly, resort to legislative history is appropriate and helpful. The complete legislative history is reproduced in Addendum A to this brief.

Thankfully, the legislative history is much clearer than the statute itself in showing that the measure is aimed at and limited to challenges based on the allegation that a governmental taking is not for a valid public purpose. The sponsor of the measure, Rep. Jim D. Kempton, provided testimony on the measure to the House State Affairs Committee on January 30, 1996. His testimony on House Bill 628 was summarized in the record as follows, "This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain." (Emphasis supplied.) Virtually identical statements were made by Rep. Kempton before the same committee on February 13, 1996, and on March 1, 1996 to the Senate Local Government and Taxation Committee. This language also corresponds, word for word, to the official statement of purpose for the bill (H.B. 628). At the March 1, 1996 hearing, Rep. Kempton also handed out a packet of information including a copy of Idaho Const., art. I, § 14, with the relevant language underlined, as well as an exchange of correspondence with the Office of the Idaho Attorney General discussing this constitutional language. Thus the legislative history is consistent with the language of the statute itself which limits the new exhaustion exception to those rare situations in which a landowner contends that a regulatory action is not for a legitimate "public use." This conclusion is further reinforced by the

agenda heading for the hearing on March 1, 1996, which said that the bill "[p]rovides remedy for zoning action was in essence an eminent domain action."

Plainly, then, the scope of the legislation is quite narrow. It applies to an "affected person" who asserts that his or her property is being taken for something other than a public purpose. This would include, for example, the property owner who is the target of an eminent domain proceeding facilitating a private development. Presumably, it would also include a neighboring property owner affected by a new development facilitated through eminent domain. But that is all it does. It does not provide a blanket exemption from the exclusive judicial review provisions of LLUPA for anyone alleging a regulatory taking in the context of their own development.

The fact that a similar exemption was not included in LLUPA's other judicial review provision, Idaho Code § 67-6519(4)—which applies to the permit applicant—reinforces the idea that this measure is intended to protect those on the receiving end of eminent domain proceedings—people like Susette Kelo whose home was demolished to make way for Pfizer—not to protect the developers themselves by providing an end-run around LLUPA. Indeed, the absence of a corresponding exemption from section 67-6519(4) presents at least an argument that "applicants" for permits under section 67-6519(4) are not covered, and that the exemption applies only to other "affected persons" under section 67-6521(2).

The bottom line is that the controlling time limitation on White's case is not four years, but 28 days. And White's case does not fall within the exception in section 67-6521(2) applicable to challenges based on a condemnation not being for a proper public use.

CONCLUSION

In *Buckskin*, the Court outlined the statute of limitations issue at some length, even quoting from the district court's decision. *Buckskin*, 154 Idaho at 495, 300 P.3d at 26. Ultimately, however, the Court found it unnecessary to address the question, because payment of the very

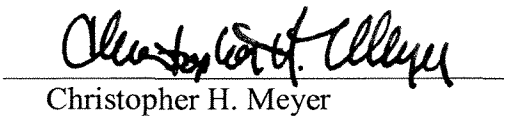
same road fee requirement was found to be voluntary. *Buckskin*, 154 Idaho at 495-97, 300 P.3d at 26-28. The certified question presented here provides an opportunity for the Court to squarely address this issue.

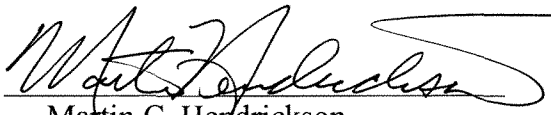
For the reasons discussed above, the County urges the Court to rule that when an applicant for a development permit challenges a condition or requirement that property be conveyed or fees be paid to the government and the challenge is not based on the amount of the property conveyed or fee charged, the claim accrues when it becomes apparent that the applicant will be required to make a conveyance or payment as a condition of that development.

The County further urges the Court to clarify that the catch-all four-year statute of limitations may be supplanted and replaced by another more specific and individualized deadline for initiating litigation established by the Legislature. This would include the 28-day deadline for seeking judicial review under LLUPA and/or a taking analysis under the Idaho Regulatory Taking Act.

Respectfully submitted this 19th day of August, 2013.

GIVENS PURSLEY LLP

By 
Christopher H. Meyer

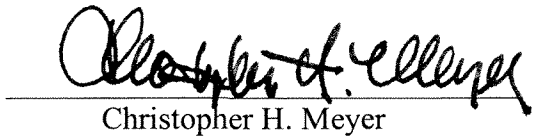
By 
Martin C. Hendrickson

Attorneys for Defendant/Respondent Valley County

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of August, 2013, the foregoing was served as follows:

Victor S. Villegas BORTON LAKEY LAW OFFICES 141 E. Carlton Ave. Meridian ID 83642 Facsimile: 208-493-4610 victor@borton-lakey.com	☒ ☐ ☐ ☐ ☒	U. S. Mail Hand Delivered Overnight Mail Facsimile E-mail



Christopher H. Meyer

ADDENDUM A:

LEGISLATIVE HISTORY OF IDAHO CODE § 67-6521(2)(B)

Fifty-third Legislature — LEGISLATURE OF THE STATE OF IDAHO — Second Regular Session - 1996

IN THE HOUSE OF REPRESENTATIVES

HOUSE BILL NO. 628

BY STATE AFFAIRS COMMITTEE

AN ACT

RELATING TO PLANNING AND ZONING; AMENDING SECTION 67-6521, IDAHO CODE, TO PROVIDE REMEDIES FOR AN AFFECTED PERSON WHO CLAIMS THAT A ZONING ACTION OR PERMITTING ACTION WAS IN ESSENCE AN EMINENT DOMAIN ACTION.

Be It Enacted by the Legislature of the State of Idaho:

SECTION 1. That Section 67-6521, Idaho Code, be, and the same is hereby amended to read as follows:

67-6521. ACTIONS BY AFFECTED PERSONS.

(1) (a) As used herein, an affected person shall mean one having an interest in real property which may be adversely affected by the issuance or denial of a permit authorizing the development.

(b) Any affected person may at any time prior to final action on a permit required or authorized under this chapter, if no hearing has been held on the application, petition the commission or governing board in writing to hold a hearing pursuant to section 67-6512, Idaho Code; provided, however, that if twenty (20) affected persons petition for a hearing, the hearing shall be held.

(c) After a hearing, the commission or governing board may:

(~~1~~i) Grant or deny a permit; or

(~~2~~ii) Delay such a decision for a definite period of time for further study or hearing. Each commission or governing board shall establish by rule and regulation a time period within which a recommendation or decision must be made.

(d) An affected person aggrieved by a decision may within twenty-eight (28) days after all remedies have been exhausted under local ordinances seek judicial review as provided by chapter 52, title 67, Idaho Code.

(2) (a) Authority to exercise the regulatory power of zoning in land use planning shall not simultaneously displace coexisting eminent domain authority granted under section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

(b) An affected person claiming "just compensation" for a perceived "taking," the basis of the claim being that a specific zoning action or permitting action restricting private property development is actually a regulatory action by local government deemed "necessary to complete the development of the material resources of the state," or necessary for other public uses, may seek a judicial determination of whether the claim comes within defined provisions of section 14, article I, of the constitution of the state of Idaho relating to eminent domain. Under these circumstances, the affected person is exempt from the provisions of subsection (1) of this section and may seek judicial review through an inverse condemnation action specifying neglect by local government to provide "just compensation" under the provisions of section 14, article I, of the constitution of the state of Idaho and chapter 7, title 7, Idaho Code.

STATEMENT OF PURPOSE

RS 05533C1

This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

FISCAL NOTE

No cost to local government unless district court makes a determination that public use under provisions of eminent domain applies and that a taking has occurred.

CONTACT: Representative Jim Kempton

STATEMENT OF PURPOSE/FISCAL NOTE H 628

Minutes

HOUSE STATE AFFAIRS

DATE: JANUARY 30, 1996

TIME: 9:00 A.M.

PLACE: Room 412

PRESENT: Chairman Crane, Vice Chairman Deal, Representatives Stone, Tippets, Wood, Sutton, King, Alltus, Dorr, Erhart, Hornbeck, Kjellander, Field, Gines, Vandenberg, Stoicheff, Alexander and Judd.

ABSENT: Representatives Newcomb and Loertscher were absent.

MOTION: Chairman Crane called the meeting to order at 9:03 A.M. Representative King moved that the minutes of January 29, 1996 be approved. The motion was seconded by Representative Dorr. Motion Passed.

RS05744 Representative Stoicheff presented RS05744. The purpose of this Legislation is to allow people who do not live within a fire district but do own property within a fire district and who are Idaho residents to vote in all fire districts elections.

MOTION: Representative Vandenberg made a motion that RS05744 be introduced for printing. Representative Stone seconded the motion. Motion passed.

RS05248C1 Representative Alltus presented RS05248C1. The purpose of this legislation is to stop public funds from going to lobbying.

MOTION: Representative Erhart made a motion that RS05248C1 be returned to sponsor. Representative Stone seconded the motion.

SUBSTITUTE MOTION: Representative Dorr made a substitute motion that RS05248C1 be introduced for printing. Representative Gines seconded the motion. The motion passed. Counting vote of 12 Ayes.

RS05332C2 Mr. Freeman Duncan from the Attorney General's Office, presented RS05332C2. The purpose of this legislation is to address the statewide problems associated with the recording of vexatious common law liens against state and local officials. The legislation deals with non-statutory lien claims that are not court-imposed, are not consented to by the owner of the property being liened, and are premised upon the alleged performance or nonperformance of an official's duties. The legislation provides for an expedited court procedure for challenge of the lien, and for the ability of the property owner to recover a civil penalty of $5,000.00 or actual damages, which ever is greater, if the claim is found by a court to be groundless or false. Mr. Bill Von Tagen, from the Attorney General's office, answered questions raised by the committee concerning RS05332C2.

MOTION: Representative Hornbeck made a motion that RS05332C2 be introduced for printing. Representative Stone seconded the motion. The motion passed.

RS05507 Representative Crow presented RS05507. The purpose of this legislation is to repeal the Idaho Code which allows dog racing. It would further amend the Idaho Code to eliminate dog racing from the definition of a race meet and to eliminate references to

training dogs to race by the use of live lures.

MOTION: Representative Wood made a motion that RS05507 be introduced for printing. Representative Dorr seconded the motion. The motion passed.

RS05533C1 Representative Kempton presented RS05533C1. This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain. Representative Kempton brought to the attention of the committee that a typo error needed to be corrected on line 32. ..."taking," should read "taking", ...

MOTION: Vice Chairman Deal made a motion that RS05533C1 be introduced for printing with the typo error corrected. Representative Gines seconded the motion The motion passed. Legislative services indicated that the RS05533C1 was correct as typed. Representative Kempton will let Chairman Crane know that the RS was printed as first read.

H 419 Mr. Dwight Johnson from the Department of Employment, presented H 419. This bill contains three amendments to Idaho's Employment Security Law. Currently, one criteria for determining wether an employer is covered by the Employment Security Law is whether the employer paid three hundred dollars ($300) in covered wages in a calendar quarter. H 419 increased the amount covered to fifteen hundred dollars ($1500). The second amendment would allow the Governor to consolidate the Employment Service Advisory Council with similarly focused advisory bodies to eliminate overlapping advisory bodies and their attendant costs. The third amendment allows individuals filing a new claim for unemployment insurance benefits to voluntarily elect to have federal income tax withheld from their benefits checks.

MOTION: Representative Erhart made a motion that H 419 be sent to the floor with a DO PASS. Representative Wood seconded the motion. The motion passed. Vice Chairman Deal will Sponsor the bill on the floor.

Meeting adjourned at 10:08 A.M. Next meeting will be Wednesday, January 31, 1996 at 9:30 A.M.

RON G. CRANE, CHAIRMAN

JUDITH CHRISTENSEN, SECRETARY

Minutes

HOUSE STATE AFFAIRS

DATE: February 13, 1996

TIME: 8:30 A.M.

PLACE: Room 412

PRESENT: Chairman Crane, Vice Chairman Deal, Representatives Stone, Wood, Erhart, Sutton, King, Alltus, Dorr, Hornbeck, Kjellander, Field, Newcomb, Stoicheff, Judd, Tippets, Vandenberg, Alexander and Gines.

ABSENT: Representative Loertscher

MOTION: Chairman Crane called the meeting to order at 8:40 A.M. Representative King moved that the minutes of February 12, 1996 be approved. The motion was seconded by Representative Alltus. Motion Passed.

RS05876 Representative Gines presented RS05876. This Joint House Memorial deems it to be a violation of the rights of those who serve in our nation's military and the rights of the American people who pay for our nation's military to transfer the United States armed forces to the United Nations or any other foreign command.

MOTION: Representative King made a motion that RS05876 be introduced for printing. Representative Dorr seconded the motion. Motion passed.

H 628 Representative Kempton presented H 628. This proposed legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

MOTION: Vice Chairman Deal made a motion that H 628 be sent to the floor with a DO PASS. Representative Stone seconded the motion. Motion passed.

H 654 Mr. Michael Sheeley from the Department of Administration presented H 654. To amend existing central postal system statutes to allow statehouse mail delivery to all state office buildings located within the boundaries of Ada County.

Testimony in favor of H 654 was given by Mr. Jake Hofhman from the Department of Administration.

Testimony opposed to H 654 was given by Mr. Ed Johnson from Auto Sort, Mr. David Eichmann, manager of BSU mail services and Ms. Linda-Diane Hill from Pitney Bowes Company.

H 654 was assigned to a sub-committee chaired by Vice Chairman Deal. Representatives Hornbeck, Field, Dorr and Vandenberg will serve on the committee.

H 657 Mr. Michael Sheehey presented H 657. This legislation authorized the Administration of the Division of Purchasing to acquire information technology property by means of the award of a contract to multiple bidders.

Testimony in support of H 657 was given by Mr. Gary Silvester from the Department of Administration and Ms. Elinor Cheney, accountant for the Commission on Aging.

MOTION: Representative Alltus made a motion to send H 657 to the floor with a DO PASS. Vice Chairman Deal seconded the motion. Motion passed. Representative Stoicheff recorded as a nay vote. Representative King will carry the bill.

H 661 Ms. Pam Ahrens, Director of the Department of Administration presented H 661. This legislation repeals the existing statute regarding the Advisory Council on Information Technology and creates the Information Technology Resource Management Council.

Testimony supporting H 661 was given by Mr. Gene Watkins.

MOTION: Representative Kjellander made a motion that H 661 be sent to the floor with a DO PASS. Representatives Field, Hornbeck, and Alexander seconded the motion. Motion passed. Representatives Kjellander and Alexander will carry the bill to the floor.

H 676 Representative Newcomb presented H 676. The purpose of this legislation is to require the state Historic preservation officer be appointed by the Governor.

Testimony supporting H 676 was given by Mr. Weldon Branch representing ICA and Mr. Frank Land representing ICA.

MOTION: Representative Sutton made a motion that H 676 be sent to the floor with a DO PASS. Representatives Wood, Stone, Hornbeck and Kjellander seconded the motion. Motion passed. Representative Newcomb will carry the bill to the floor.

Meeting adjourned at 10:10 A.M. Next meeting for the State Affairs Committee will be Wednesday, February 14, 1996, at 9:00 A.M.

RON G. CRANE, CHAIRMAN

JUDITH CHRISTENSEN, SECRETARY

AGENDA

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

3:00 P.M.

ROOM 426

FRIDAY, MARCH 1, 1996

BILL NO.	*DESCRIPTION*	*SPONSOR*
H 765	Sales tax seller's permits	Tax Commission
H 686	Income tax grocery credit, must be Idaho resident	Rep. Wood
H 628	Provides remedy for a zoning action which was in essence an eminent domain action	Rep. Kempton
H 672	Transportation analysis, local jurisdiction	Association of Cities
H 741	Firefighter labor relations with political subdivisions	Ken McClure
H 757aa	Budget limit exemption for five years/capital improvement projects	Cities
H 809	Income tax shareholder/corporate credits for payment	Phillip Barber

Minutes

SENATE LOCAL GOVERNMENT & TAXATION COMMITTEE

DATE: March 1, 1996

TIME: 3:00 p.m.

PLACE: Room 426

PRESENT: Chairman Thorne, Senators Hawkins, Parry, Furness, Frasure, Ipsen, Wheeler, Tucker and Stennett

ABSENT/ EXCUSED: None

Chairman Thorne called the meeting to order at 3:07 p.m. Senator Furness moved approval of the minutes for February 23, 1996. Senator Parry seconded the motion. By unanimous voice vote the motion passed. Senator Tucker moved approval of the minutes for February 28, 1996. Senator Wheeler seconded the motion. By unanimous voice vote the motion passed. Senator Frasure moved approval of the minutes for February 26, 1996. Senator Tucker seconded the motion. By unanimous voice vote the motion passed. A silent roll call was taken.

H 765 **Ted Spangler**, Idaho State Tax Commission, presented House Bill 765. This legislation makes changes to the Idaho Sales Tax Act relating to seller's permits. Presently, seller's permits are indefinite. Many of these sellers are no longer in business. With this legislation, seller's permits will automatically expire after a period of twelve consecutive months of no sales reported. Non-profit organizations that have only one large sale per year can apply for a one time sale report.

MOTION Senator Ipsen moved to send House Bill 765 to the floor with a "do pass" recommendation. Senator Frasure seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Ipsen will carry the bill.

H 686 **Representative Wood** explained House Bill 686. This legislation is an effort to stop the practice of persons claiming a grocery credit on their taxes when filing for dependents not domiciled in this State. Enforcement would be up to tax preparers.

MOTION Senator Ipsen moved that House Bill 686 be sent to the floor with a "do pass" recommendation. Senator Parry seconded the motion.

SUBSTITUTE MOTION Senator Tucker moved to hold House Bill 686 in committee. Senator Frasure seconded the motion.

ROLL CALL VOTE By a roll call vote of 3-6 the substitute motion failed, with Senators Hawkins, Frasure and Tucker voting aye; and Senators Thorne, Parry, Furness, Ipsen, Wheeler, and Stennett voting nay.

ROLL CALL VOTE By a roll call vote of 6-3 the original motion passed, with Senators Thorne, Parry, Furness, Ipsen, Wheeler, and Stennett voting aye; and Senators Hawkins, Frasure and Tucker voting nay. Senator Thorne will sponsor the bill.

H 628 **Representative Kempton** distributed a handout and explained House Bill 628. This legislation amends local government land use planning statutes to the extent that administrative remedies need not be exhausted prior to judicial review if a taking claim involves court determination of public use under provisions of eminent domain.

MOTION Senator Stennett moved to hold House Bill 628 in committee. There was no second.

MOTION Senator Frasure moved to send House Bill 628 to the full Senate with a "do pass" recommendation. Senator Wheeler seconded the motion.

Senator Stennett felt this would create more crowding in the courts. Senator Hawkins felt this may increase local discussion and lighten the load on the courts.

ROLL CALL VOTE By a roll call vote of 8-1 the motion passed, with Senators Thorne, Hawkins, Parry, Furness, Frasure, Ipsen, Wheeler, and Tucker voting aye; and Senator Stennett voting nay. Senator Hawkins will sponsor the bill.

UNANIMOUS CONSENT REQUEST Chairman Thorne requested unanimous consent to hold House Bill 809 until Monday, given that two of the committee members needed to be excused momentarily, and the sponsor desired to have all members present for the hearing on House Bill 809. There were no objections.

H 672 **Scott McDonald,** Association of Idaho Cities, explained House Bill 672. This legislation requires the cities and counties to prepare the comprehensive plans in coordination with whoever has jurisdiction over the local highway system.

MOTION Senator Wheeler moved to send House Bill 672 to the floor with a "do pass" recommendation. Senator Frasure seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Wheeler will carry the bill.

H 741 **Ken McClure,** representing the City of Boise, explained House Bill 741. Idaho Code currently requires government entities to negotiate fire fighter contracts through a quorum of the city council and mayor, or county commission, or fire district board. This legislation would allow the government entity to designate a person with authority to bargain on its behalf.

MOTION Senator Furness moved to send House Bill 741 to the floor with a "do pass" recommendation. Senator Stennett seconded the motion.

VOTE By unanimous voice vote the motion passed. Senator Furness will carry the bill.

H 757a **Scott McDonald** presented House Bill 757 as amended to the committee. This legislation will extend from 2 years to 5 years for capital improvements as an exemption from the budget limitations of taxing districts. He suggested a new amendment to replace two and add the word "or" to make the new language read "two or five years"

MOTION Senator Hawkins moved to hold House Bill 757a in committee. Senator Furness seconded the motion.

SUBSTITUTE MOTION Senator Wheeler made a substitute motion to send House Bill 757a to the 14th order for amendment. Senator Stennett seconded the motion.

VOTE By majority voice vote the substitute motion failed.

VOTE By majority voice vote the original motion passed. House Bill 757 as amended will be held in committee.

Meeting adjourned at 4:28 p.m.

SENATOR J.L. "JERRY" THORNE, Chairman

NANCY BERGER, Committee Secretary

HB 628 3/1/96
— KEMPTON —

except in the manner prescribed by law.

TION 13. GUARANTIES IN CRIMINAL ACTIONS AND DUE PROCESS OF LAW. In all criminal prosecutions, the ccused shall have the right to a speedy and public trial; to have the process of the court to compel endance of witnesses in his behalf, and to appear and defend in person and with counsel.
person shall be twice put in jeopardy for the same offense; nor be compelled in any criminal case to be ss against himself; nor be deprived of life, liberty or property without due process of law.

TION 14. RIGHT OF EMINENT DOMAIN. The necessary use of lands for the construction of reservoirs or basins, for the purpose of irrigation, or for rights of way for the construction of canals, ditches, or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for ge; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, s, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other cessary to the complete development of the material resources of the state, or the preservation of the of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of ate.
rivate property may be taken for public use, but not until a just compensation, to be ascertained in the prescribed by law, shall be paid therefor.

TION 15. IMPRISONMENT FOR DEBT PROHIBITED. There shall be no imprisonment for debt in this state in cases of fraud.

TION 16. BILLS OF ATTAINDER, ETC., PROHIBITED. No bill of attainder, ex post facto law, or law impair- e obligation of contracts shall ever be passed.

TION 17. UNREASONABLE SEARCHES AND SEIZURES PROHIBITED. The right of the people to be secure in their s, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no nt shall issue without probable cause shown by affidavit, particularly describing the place to be hed and the person or thing to be seized.

ECTION 18. JUSTICE TO BE FREELY AND SPEEDILY ADMINISTERED. Courts of justice shall be open to every n, and a speedy remedy afforded for every injury of person, property or character, and right and justice l be administered without sale, denial, delay, or prejudice.

SECTION 19. RIGHT OF SUFFRAGE GUARANTIED. No power, civil or military, shall at any time interfere with revent the free and lawful exercise of the right of suffrage.

SECTION 20. NO PROPERTY QUALIFICATION REQUIRED OF ELECTORS -- EXCEPTIONS. No property qualifications l ever be required for any person to vote or hold office except in school elections, or elections creating btedness, or in irrigation district elections, as to which last-named elections the legislature may rict the voters to land owners.

SECTION 21. RESERVED RIGHTS NOT IMPAIRED. This enumeration of rights shall not be construed to impair or other rights retained by the people.

ARTICLE II

DISTRIBUTION OF POWERS

SECTION 1. DEPARTMENTS OF GOVERNMENT. The powers of the government of this state are divided into three tinct departments, the legislative, executive and judicial; and no person or collection of persons charged the exercise of powers properly belonging to one of these departments shall exercise any powers properly onging to either of the others, except as in this constitution expressly directed or permitted.

ARTICLE III

LEGISLATIVE DEPARTMENT

SECTION 1. LEGISLATIVE POWER -- ENACTING CLAUSE -- REFERENDUM -- INITIATIVE. The legislative power of the te shall be vested in a senate and house of representatives. The enacting clause of every bill shall be as lows: "Be it enacted by the Legislature of the State of Idaho."
The people reserve to themselves the power to approve or reject at the polls any act or measure passed by legislature. This power is known as the referendum, and legal voters may, under such conditions and in manner as may be provided by acts of the legislature, demand a referendum vote on any act or measure sed by the legislature and cause the same to be submitted to a vote of the people for their approval or ection.
The people reserve to themselves the power to propose laws, and enact the same at the polls independent of

...OKA
...OUNTIES

...ADDRESS
...35. BOX 28
...ON, IDAHO 83311
(208) 673-6261

COMMITTEES
REVENUE & TAXATION
TRANSPORTATION & DEFENSE
JUDICIARY, RULES & ADMINISTRATION

House of Representatives
State of Idaho

January 15, 1996

TO: OFFICE OF THE ATTORNEY GENERAL

SUBJECT: ATTORNEY GENERAL OPINION; Eminent Domain Relevance in Land Use Planning.

Eminent domain provisions of Article 1, Section 14, of the Idaho Constitution are rather unique in that eminent domain relevance in questions of "takings" is established, in part, on the basis of actions by state or local government that are deemed "necessary to the complete development of the material resources of the state".

Blackwell Lumber Co. v. Engine Mill Co., a 1916 case before the Idaho Supreme Court, defines in considerable detail the court's authority to determine uses "necessary to the complete development of the material resources of the state"; thereby suggesting that in today's land use regulatory environment eminent domain relevance should remain a statutory consideration in an ~~"affected person's" right to access judicial review.~~ If so, an "affected person's" access to the courts need not always involve exhaustion of administrative remedies under 67-6521(d), Idaho Code.

An Attorney General's opinion is therefore requested related to the attached "RS"; specifically, in the limited context presented, is the proposed language correct in regard to an "affected person"s" right to access judicial review without a corresponding need to exhaust administrative remedies?

Thank you in advance for your assistance

Jim D. Kempton

STATE OF IDAHO

OFFICE OF THE ATTORNEY GENERAL
Statehouse, Room 210
P.O. Box 83720
BOISE 83720-0010

ALAN G. LANCE
ATTORNEY GENERAL

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Natural Resources Division
Fax: (208) 334-2690

January 24, 1996

Honorable Jim D. Kempton
Idaho House of Representatives
Statehouse
Boise, Idaho 83720

Dear Representative Kempton:

Per our discussion, I have reviewed your proposed legislation allowing certain individuals aggrieved by a planning and zoning decision of a governmental body to proceed directly to court, rather than exhaust administrative remedies if they allege a "taking" under the Idaho Constitution.

From your earlier draft which we reviewed, you have proposed adding language to the effect that the citation on lines 34-35 to the constitutional definition of a public use, i.e., "necessary to complete the development of the material resources of the state" would be broadened by the inclusion of language "or other public uses." This language alleviates our minor concern that your original language may actually limit the ability to proceed with an inverse condenmation action given an Idaho Supreme Court case which held that the constitutional provision is not a limitation on determining what constitutes a public use. With the inclusion of this language, we feel that your proposed legislation adequately conveys your intent.

I hope this letter is of assistance to you. If you have any questions, please feel free to contact me.

Very truly yours,

THOMAS F. GRATTON
Deputy Attorney General
Intergovernmental & Fiscal Law Division

TFG\yj

LOCAL GOVERNMENT AND TAXATION COMMITTEE

VISITOR AND TESTIMONY SIGN-UP SHEET Date 3-1-96

Name Address/City/Zip	Representing	Legislation interested in	Wish to testify Yes/No	Handouts available	Oppose/ support
Robert D. Lilly 5306 Dakota Boise 83709	self	~~HB~~ general info	No		
Dan John	Tax Commission	H 809			
Derk Santos	DFM				
Ted Springlor	Tax Commin	HB 764	Yes		Supp
Jim Kempton	House	HB428	Sponsor		
Jo Ann Wood	House	H 686	Yes Sponsor		Support
Ken McClure	city of Boise	HB 741	YES		Support
Richard G Lutz	Melaleuca	HB 809	NO		Support
PHIL BARBER	"	"	Yes		"
Brady Pantopoulos	Melaleuca	HB809	No		Support

ROLL CALL VOTE

DATE 3-1-96 SUBJECT Juvenile detention testing BILL # 1628

ORIGINAL MOTION do pass				SUBSTITUTE MOTION				AMENDED SUBSTITUTE MOTION			
	AYE	NAY	A/E		AYE	NAY	A/E		AYE	NAY	A/E
THORNE	1			THORNE				THORNE			
HAWKINS	1			HAWKINS				HAWKINS			
PARRY	1			PARRY				PARRY			
FURNESS	1			FURNESS				FURNESS			
FRASURE	1			FRASURE				FRASURE			
IPSEN	1			IPSEN				IPSEN			
WHEELER	1			WHEELER				WHEELER			
TUCKER	1			TUCKER				TUCKER			
STENNETT		1		STENNETT				STENNETT			

8-1-0

MOVED Frasure MOVED _____ MOVED _____

SECONDED Wheeler SECONDED _____ SECONDED _____